



REACHING OUT OR OVERREACHING

Judicial Ethics and Self-Represented Litigants

Cynthia Gray



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Executive Summary

The responsibility of ensuring a fair trial in cases involving self-represented litigants requires patience, skill, and understanding on the part of the trial judge. Under the code of judicial conduct, no reasonable question is raised about a judge's impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide a self-represented litigant acting in good faith the opportunity to have his or her case fairly heard — and, therefore, a judge should do so. The concept of judicial impartiality does not require an inflexible approach to courtroom procedures that sacrifices fairness, courtesy, and effectiveness. Providing reasonable accommodations for pro se litigants is consistent with the discretion a judge has to control parties and proceedings and with the role of a judge as more than a mere functionary who preserves order and lends ceremonial dignity. Moreover, the principles that the rules of procedure do not require sacrifice of fundamental justice and that cases should be decided on the merits support judicial intervention to ensure that a pro se litigant gets at least a fair chance to present his or her case.

A judge is required to set an example of courtesy toward self-represented litigants for others to follow, to ensure that court staff receive the training necessary to provide patient, helpful service to self-represented litigants, and to prevent attorneys from taking advantage of self-represented litigants. Thus, a judge should not use a tone or manner that is intimidating or disdainful or make negative comments regarding the wisdom of self-representation. Moreover, a judge should address self-represented litigants with titles comparable to those used for counsel and avoid over-familiar conduct toward attorneys.

No reasonable question is raised about a judge's impartiality if the judge avoids legal jargon, abbreviations, acronyms, shorthand, and slang that would confuse a self-represented litigant. Moreover, giving a rationale for a decision is inherently part of the duty of a judge, and doing so in a case involving a self-represented litigant could not reasonably be considered evidence of partiality even if explaining the basis for a ruling incidentally assists a self-represented litigant.

A judge should take pains to protect self-represented litigants against the consequences of technical errors. Moreover, liberal construction of pleadings

filed by self-represented litigants and freely allowing amendment of pleadings are not special accommodations for self-represented litigants but simply an application of the rule for all cases under the modern notice-pleading practice that is even more justified in cases involving self-represented litigants. The liberal construction rule requires that a judge give effect to the substance, rather than the label, of a self-represented litigant's papers, recognizing any obvious possible cause of action or defense suggested by the facts alleged even if the litigant does not expressly invoke that theory. However, the liberal construction rule does not relieve a self-represented litigant of the responsibility of making sufficient factual allegations to give the other side fair notice or permit a judge to apply a more sympathetic view of the substantive law or relieve a self-represented litigant of the usual burden or standard of proof.

It does not raise reasonable questions about a judge's impartiality for the judge to explain to all parties how the proceedings will be conducted, for example, to explain the process, the elements, that the party bringing the action has the burden to present evidence in support of the relief sought, the kind of evidence that may be presented, and the kind of evidence that cannot be considered. In a logical extension of the majority rule that a self-represented litigant should be instructed how to respond to a motion for summary judgment, a trial judge should instruct a self-represented litigant in the proper procedures for any action he or she is obviously attempting to accomplish. Facilitating an unrepresented litigant's presentation of his or her own case, as the litigant has conceived it, is the provision of legal information, not legal advice.

In all cases, including those with self-represented litigants, a judge has the discretion to ask questions of witnesses to clarify testimony and develop facts. A judge's clarifying questions do not unfairly disadvantage the represented party by altering the evidence but simply eliminate the unfair advantage a represented party might gain if a self-represented party is unable to present the facts in a way the judge or jury can comprehend. A judge may also use questions to fill a gap in the evidence that is likely to result in a decision other than on the merits. Moreover, a judge may create an informal atmosphere for the acceptance of evidence and testimony, relaxing the formal rules of procedure and evidence for cases involving self-represented litigants. A judge should ensure that a settlement presented for entry as a court order is not unduly one-sided and is understood by all litigants.

A judge's ability to make reasonable accommodations for pro se litigants does not oblige a judge to overlook a self-represented litigant's violation of a clear order, to repeatedly excuse a self-represented litigant's failure to comply with deadlines, or to allow a self-represented litigant to use the process to harass the other side.

To suggest techniques judges may effectively and ethically use to fairly handle litigation involving self-represented parties, included are Proposed Best Practices for Cases Involving Self-Represented Litigants for consideration and adaptation by jurisdictions as guidance for their judges.

Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants

INTRODUCTION

Since at least the 1990s, courts in the United States have risen to the challenge posed by the increasing number of litigants who are representing themselves in court.¹ Rather than ignoring the phenomenon or simply grumbling about it, local and state jurisdictions have developed innovative programs to make the courts less mystifying for self-represented litigants and are continuing to be inventive and resourceful particularly as they share their best practices in national forums.² Such programs include simplified forms and electronic filing, public information and assistance programs (for example, self-help web-sites and centers), training and support materials (for example, videos and Powerpoint presentations), community outreach and access programs, and training of court staff. Neither the intention nor the effect of the programs is to encourage litigants to come to court without an attorney; the efforts are a response to a trend that is caused by factors beyond the courts' control and that the courts cannot pretend is not happening or will go away. Most judges have supported these programs to improve access to justice, to prevent cases involving pro se litigants from bogging down the system, and to prevent unfair treatment of pro se litigants from undermining public confidence in the courts.

Most of these programs, however, deal with self-represented litigants outside the courtroom, and, regardless how much assistance the programs provide, in the end, it is the trial court judge who must figure out whether and how to depart from business as usual in pleadings, motion practice, hearings, and other procedures when one or both of the parties is unrepresented.

1. See Goldschmidt, Mahoney, Solomon, and Green, *Meeting the Challenge of Pro Se Litigation* (AJS 1998).

2. See *Effective Practices: Tested Ideas from the Field in Self-represented Litigant Access to Justice Innovation* (2005), a paper prepared for the National Summit on the Future of Self-Represented Litigation, available at www.selfhelpsupport.org. The best way to keep track of the innovations is to visit the American Judicature Society pro se forum at www.ajs.org/prose/home.asp and to subscribe to www.selfhelpsupport.org.

Many judges otherwise sympathetic to the plight of self-represented litigants are reluctant to deviate from their usual procedures out of concern they will compromise their impartiality or make represented litigants feel they are helping the other side. One judge wrote:

I respect the generous impulse that prompts my siblings to grant [the plaintiff] special indulgence as a pro se litigant Nor do I doubt that justice in the case is served thereby; it is. Well and very well, for the short run. But the run of justice according to law is a long one, and I doubt that it is well served by offering incentives to pro se litigation. Nor do I see how, once the judge is cast in the role of counsel for the pro se litigant in one respect and reversed for failing to ascertain that role and embrace it, we can easily cut steps in the slippery slope onto which we have advanced. . . .

. . . The role of Scrooge is one that I assume unhappily, but once we begin to confect a general set of rules more favorable to those who proceed without counsel than to those who do, I know of no principled way to stop. I would not begin.³

In Canon 2, the code of judicial conduct requires a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and to avoid conduct that would make an objective, reasonable observer question the judge’s impartiality even if the judge is not actually biased.

As basic as impartiality is to the ethical standards for judges, however, it is not the only principle in the code of judicial conduct.

Perhaps because judicial neutrality and impartiality so often are extolled, . . . judges who have before them pro se litigants whose pleadings or presentations are deficient in some minor way, sometimes take an unnecessarily strict approach, and, in the name of strict neutrality, compromise fairness, courtesy, and efficiency, which are also hallmarks of an honorable judicial system required by the code of judicial conduct.⁴

3. *Barker v. Norman*, 651 F.2d 1107, 1133 (5th Circuit 1981) (Gee, concurring in part and dissenting in part). See also *Gordon v. Leeke*, 574 F.2d 1147, 1156 (4th Circuit), *cert. denied*, 439 U.S. 970 (1978) (Hall, dissenting) (“no matter how well-intentioned a judge may be, once he assumes the role of an ‘advocate’ for a pro se litigant, he or she will lose the respect of either the pro se prisoner litigant, or the defendants whom he has sued or both”); *State v. Jackson*, 141 S.W.3d 391, 392 (Missouri Court of Appeals 2004) (inability to relax standards for non-lawyers “is not for lack of sympathy, but rather it is necessitated by the requirement of judicial impartiality, judicial economy and fairness to all parties”).

4. *Indiana Advisory Opinion 1-97* (www.in.gov/judiciary/admin/judqual/opinions.html).

Any judge who agrees that fairness, courtesy, and efficiency are also hallmarks of an honorable judicial system – and most do – should recognize that the judge’s role in any case, but particularly in a case involving one or more self-represented litigants, is more than simply “calling balls and strikes.”⁵

The thesis of this paper is that, under the code of judicial conduct, no reasonable question is raised about a judge’s impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide a diligent self-represented litigant acting in good faith the opportunity to have his or her case fairly heard — and, therefore, that a judge should do so. This paper proposes that the model code of judicial conduct and the state and federal codes of conduct be amended to make the appropriateness of such conduct explicit.

The paper begins by discussing some of the premises underlying this proposition, as well as some of the objections raised to granting latitude toward self-represented litigants, and describes the techniques recommended for cases involving self-represented litigants. Some of these practices – treating litigants courteously, liberally construing pleadings, liberally allowing amendments, and asking questions to clarify evidence – cannot even be considered accommodations for self-represented litigants; they are requirements in all cases and for all litigants although they take on greater urgency in cases involving self-represented litigants. Other techniques – such as giving clear, plain English explanations for decisions and explaining how the case will proceed – simply remove some of the mystery from a system that is supposed to serve its citizens, not baffle them. Even the more ambitious suggestions – relaxing some of the rules of evidence and instructing a self-represented litigant in the proper way to accomplish a procedural step – are logical extensions of the principle that fundamental justice should not be sacrificed to procedural rules, stopping far short of turning the judge into an advocate. To suggest techniques judges may effectively and ethically use to fairly handle litigation involving self-represented parties, this paper includes Proposed Best Practices for Cases Involving Self-Represented Litigants to be considered and adapted by jurisdictions as guidance for their judges.⁶

THE SAME BUT DIFFERENT

Uncertainty among trial judges about how to treat self-represented litigants is understandable given the mixed signals sent by appellate courts. Case after case

5. John Greacen, a former court administrator and currently a consultant on court management, reports that in talking with judges about cases involving self-represented litigants, he has “often heard the phrase, ‘The job of the judge is to call the balls and strikes, not to throw the pitches.’” Greacen, “Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts,” 44 *Judges’ Journal* 24, 26 (ABA winter 2005).

6. See also Albrecht, Greacen, Hough, Zorza, “Judicial Techniques for Cases Involving Self-Represented Litigants,” 41 *Judges’ Journal* 16 (ABA winter 2003).

announces “the hoary but still vigorous rule”⁷ that self-represented litigants are held to the same standard as attorneys – and then case after case, often the same cases, describes exceptions to that rule and the special treatment trial judges should accord to those without attorneys.

One way to reconcile these competing holdings affirms that attorneys and self-represented litigants are held to the same standard – courts should be lenient with both when appropriate to promote the goal of deciding cases on the merits. The New Mexico Supreme Court took this approach recently when it proposed a new rule regarding unbundled legal services. The court reiterated the rule that “in New Mexico courts, attorneys and self-represented litigants are held to the same standards” but continued: “New Mexico courts are lenient with both attorneys and self-represented litigants when deemed appropriate so that cases may be decided on their merits.”⁸

To illustrate, consider the following story recounted by former Florida Chief Justice Major Harding:

A trial judge was hearing a divorce petition in which the respondent had defaulted. The wife presented the matter without counsel and failed to offer any evidence bearing on the court’s jurisdiction to hear the matter. The judge told the wife that he could not grant her a divorce because she had failed to establish her entitlement to one, advising her to consult a lawyer. The woman left the courtroom in tears. In the next case, a lawyer for a wife in a defaulted divorce failed to elicit any evidence of the court’s jurisdiction. The judge noted that counsel had failed to do so, and the attorney immediately recalled the client to the stand and asked her how long she had lived in the county. The judge granted the requested divorce. Suddenly aware of his double standard, the judge called his bailiff and asked him to quickly search the courthouse to find the woman whose case he had just dismissed. The bailiff succeeded. The judge reopened the case on the record, placed the woman under oath, asked how long she had lived in the county, and, after receiving an acceptable response, granted her divorce.⁹

Trial courts possess “a discretionary range of control over parties and proceedings” that allows reasonable accommodations to self-represented litigants.¹⁰

7. *Gamet v. Blanchard*, 111 Cal. Rptr. 2d 439, 447 (California 4th District Court of Appeal 2001) (Bedsworth, dissenting).

8. New Mexico Supreme Court, “Proposed Amendments to Committee Commentary for 16-303 NMRA,” *New Mexico State Bar Bulletin* 15 (October 28, 2004), discussed in Greacen, “Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts,” 44 *Judges’ Journal* 24, 33 (ABA winter 2005).

9. Included in Albrecht, Greacen, Hough, Zorza, “Judicial Techniques for Cases Involving Self-Represented Litigants,” 41 *Judges’ Journal* 16, 17 (ABA winter 2003).

10. *Blair v. Maynard*, 324 S.E.2d 391, 396 (West Virginia 1984).

Court have recognized that the “proper scope of the court’s responsibility to *pro se* litigants is necessarily an expression of careful exercise of judicial discretion’ Each case presents a wholly different set of circumstances which require careful attention so as to preserve the rights of all parties.”¹¹

Thus, while stating that “rules apply to uncounseled litigants and must be enforced,” the United States Court of Appeals for the 7th Circuit also recognized that “implementation of many procedural rules entails exercise of discretion.”¹² The court concluded, “discretion implies the power to say no, but when deciding whether to grant or deny . . . a motion a judge is entitled to consider all circumstances, including lack of counsel, that may have contributed” to a self-represented litigant’s error.¹³ A judge may abuse his or her discretion if he or she fails to take into account a litigant’s self-represented status.¹⁴

Of course, it would be improper for a judge to consider a party’s gender, for example, in deciding a discretionary matter. The difference between considering a litigant’s gender and considering a litigant’s *pro se* status is that gender does not inevitably affect a represented party’s ability to present his or her case while lack of representation does. Thus, taking *pro se* status into consideration does not indicate partiality but addresses “a categorical disparity between the parties’ abilities to obtain a just resolution to their dispute.”¹⁵

Because making reasonable accommodations for self-represented litigants is a matter of discretion, inevitably, exactly what a judge should do “cannot be fully described by specific formula”¹⁶ by anyone other than the judge or at any time prior to when the decision must be made. “Each case presents a wholly different set of circumstances which require careful attention so as to preserve the rights of all parties.”¹⁷ “The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. . . . Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.”¹⁸ But exercising discretion – not calling balls and strikes – is the nature of judging, from granting motions for extension of time to handing out sentences, and with some guidance and support, most judges are capable of doing so with the interests of justice in mind.

11. *Id.*, quoting ABA Commission on Standards of Judicial Administration, *Standards Relating to Trial Courts*, § 2.23 Conduct of Cases Where Litigants Appear Without Counsel (Commentary) (1976). *Accord Austin v. Ellis*, 408 A.2d 784, 785 (New Hampshire 1979).

12. *Members v. Paige*, 140 F.3d 699, 703 (7th Circuit 1998).

13. *Id.*

14. *Traguth v. Zuck*, 710 F.2d 90, 95 (2nd Circuit 1983).

15. *Jacobsen v. Filler*, 790 F.2d 1362, 1369 (9th Circuit 1985) (Reinhardt, dissenting).

16. ABA Commissions on Standards of Judicial Administration, *Standards Relating to Trial Courts*, § 2.23 at 45-47 (1976), quoted by *Austin v. Ellis*, 408 A.2d 784, 786 (New Hampshire 1979) and *Blair v. Maynard*, 324 S.E.2d 391, 396 (West Virginia 1984).

17. *Blair v. Maynard*, 324 S.E.2d 391, 396 (West Virginia 1984).

18. *Oko v. Rogers*, 466 N.E.2d 658, 661 (Illinois 3rd District Appellate Court 1984).

BASIC PRINCIPLES

Rather than being “wholly indifferent” to self-represented litigants’ lack of formal legal training,¹⁹ numerous decisions direct judges to treat self-represented litigants with “understanding of the difficulties encountered by a self-represented litigant.”²⁰ The different treatment is variously described as providing reasonable accommodations,²¹ affording latitude²² or even great latitude,²³ being lenient²⁴ and solicitous,²⁵ making allowances,²⁶ applying less stringent standards,²⁷ and giving self-represented litigants leeway²⁸ and every consideration.²⁹

Providing reasonable accommodations for self-represented litigants is consistent with the principle that the “rules of procedure do not require sacrifice of the rules of fundamental justice.”³⁰

The fundamental tenet that the rules of procedure should work to do substantial justice, . . . commands that judges painstakingly strive to insure that no person’s cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. . . . Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. This “reasonable accommodation” is purposed upon protecting the meaningful exercise of a litigant’s constitutional right of access to the courts.³¹

Moreover, intervening to ensure that a pro se litigant gets at least a fair chance to present his or her case is consistent with the proper role of a judge.

19. *Gamet v. Blanchard*, 111 Cal. Rptr. 2d 439, 445 (California 4th District Court of Appeal 2001).

20. *Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tennessee Court of Appeals 1989).

21. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minnesota Court of Appeals 2001); *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minnesota Court of Appeals 1987); *Blair v. Maynard*, 324 S.E.2d 391, 396 (West Virginia 1984).

22. *Liptak v. State ex rel. City of New Hope*, 340 N.W.2d 366, 367 (Minnesota Court of Appeals 1983); *Black v. City of Tupelo*, 853 So. 2d 1221, 1226 (Mississippi 2003); *In re Mosso*, 6 A.D.3d 872, 776 N.Y.S.2d 599 (New York Supreme Court, Appellate Division, 3rd Department 2004); *Conservation Commission v. Price*, 479 A.2d 187, 192 n.4 (Connecticut 1984).

23. *Bitoni v. Tucker*, 295 A.2d 545, 546 (Connecticut 1972).

24. *Lundahl v. Quinn*, 67 P.3d 1000, 1002 (Utah 2003).

25. *Macriocostas v. Kovacs*, 787 A.2d 64 (Connecticut Appellate Court 2001); *Borzeka v. Heckler*, 739 F.2d 444, 447 n.2 (9th Circuit 1984).

26. *Kelley v. Watson*, 77 P.3d 691, 692 (Wyoming 2003).

27. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Madyun v. Thompson*, 657 F.2d 868, 876 (7th Circuit 1981); *Bates v. Jean*, 745 F.2d 1146, 1150 (7th Circuit 1984); *United States v. Sanchez*, 88 F.3d 1243, 1247 (D.C. Circuit 1996).

28. *In the Matter of Bales*, 461 N.Y.S.2d 365, 367 (New York Supreme Court, Appellate Division, 2nd Department 1983); *Gomes v. Avco Corp.*, 964 F.2d 1330, 1335-36 (4th Circuit 1991).

29. *Heathman v. Hatch*, 372 P.2d 990, 991 (Utah 1962).

30. *United States v. Sanchez*, 88 F.3d 1243, 1248 (D.C. Circuit 1996), quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

31. *Blair v. Maynard*, 324 S.E.2d 391, 396 (West Virginia 1984).

Whether a party is represented by counsel at a trial or represents himself, the judge's role remains the same. The judge's function at any trial is to be "the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings."³²

"A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits,"³³ and the function of a trial judge "is not that of an umpire or moderator at a town meeting."³⁴ Impartiality does not require passivity.³⁵

"Affording *pro se* litigants the procedural protection of the court serves the interest not only of the litigants but also of the court itself" because "courts, no less than the parties to a dispute, have an interest in the quality of justice."³⁶ (Many of the persuasive arguments for accommodating *pro se* litigants are found in dissenting arguments in cases taking a more inflexible approach.)

The courts do not treat a litigant fairly when they insist that the litigant — unaided and unable to obtain the services of a lawyer — negotiate a thicket of legal formalities at peril of losing his or her right to be heard. Such a practice manifestly excludes the poor and the unpopular, who may be unable to obtain counsel, from access to justice.

* * *

Meaningful access requires some tolerance by courts toward litigants unrepresented by counsel. *Pro per* litigants are by no means exempt from the governing rules of procedure. But neither should courts allow those rules to operate as hidden, lethal traps for those unversed in law. This may require some degree of extra care and effort on the part of trial judges who already labor long and hard at a mushrooming caseload. But the alternative slams the courthouse door in the face of those who may be in greatest need of judicial relief, all for the sake of ease of administration. This latter course is one which I believe our Constitution does not permit and that we as judges should not tolerate.³⁷

Public confidence in the justice system is undermined if litigants are confronted with a system "dominated by forms and mysterious rituals" and told "they lose

32. *Commonwealth v. Sapoznik*, 549 N.E.2d 116, 120 n.4 (Massachusetts Appeals Court 1990).

33. *Gamet v. Blanchard*, 111 Cal. Rptr. 2d 439, 445 (California 4th District Court of Appeal 2001).

34. *Simon v. United States*, 123 F.2d 80, 83 (4th Circuit 1941).

35. See Zorza, "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications," 17 *Georgetown Journal of Legal Ethics* 423 (2004). See also Goldschmidt, "The Pro Se Litigant's Struggle for Access to Justice," 40 *Family Court Review* 36 (January 2002).

36. *Jacobsen v. Filler*, 790 F.2d 1362, 1369 (9th Circuit 1985) (Reinhardt, dissenting).

37. *White v. Lewis*, 804 P.2d 805, 815-16 (Arizona 1990) (Lankford, dissenting).

because they did not know how to play the game”³⁸

Cases that reject accommodations maintain that requiring a judge to, for example, notify a self-represented litigant of the necessity of responding to a motion for summary judgment would improperly “inject” the trial court into the adversary process to help one side and not the other.³⁹ Contrary to that reasoning, however, explaining procedures does not transform the judge into an advocate; a lawyer, after all, would not only tell a client that a response to a motion needs to be made but would actually prepare and file the response. The reasonable accommodations do not make the judge “a player in the adversary process” but make the adversary process function more equitably.⁴⁰

Some courts have argued that their refusal to extend any leniency towards self-represented litigants is justified because it was the litigant’s choice to appear without counsel, suggesting, in effect, that these litigants do not deserve any solicitude because they brought their problems on themselves by their error in judgment in disdaining counsel.

The hazards which beset a layman when he seeks to represent himself are obvious. He who proceeds *pro se* with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an “advocate” for or to assist and guide the *pro se* layman through the trial thicket.⁴¹

Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses *himself* as legal representative should be treated no differently. In both cases, the remedy to the party injured by his representative’s error is to move to reconsider or to set aside; it is not for the trial court to inject itself into the adversary process on behalf of one class of litigant.⁴²

These courts identify “choice” as the element that distinguishes *pro se* prisoner cases in which leniency has been mandated from suits involving unincarcerated *pro se* litigants, noting that detention makes it almost impossible for a prisoner to retain

38. *Moore v. Price*, 914 S.W.2d 318, 324 (Arkansas Court of Appeals 1996) (Mayfield, dissenting, quoting Justice David Newbern).

39. *Jacobsen v. Filler*, 790 F.2d 1362, 1365 (9th Circuit 1985).

40. *Id.* at 1369-70 (Reinhardt, dissenting).

41. *United States v. Pinkey*, 548 F.2d 305, 311 (10th Circuit 1977).

42. *Jacobsen v. Filler*, 790 F.2d 1362, 1365 (9th Circuit 1985). See also *Bullard v. Morris*, 547 So. 2d 789, 790 (Mississippi 1989) (person who elects to proceed without an attorney “acts at his peril”); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1195 (D.C. Circuit 1985) (self-represented litigant cannot “avoid the risks of failure that attend his decision to forgo expert assistance”).

counsel and limits the prisoner's access to legal materials.⁴³

A more realistic approach refuses to ignore that the inability to obtain affordable legal representation is one of the primary reasons many pro se litigants appear without a lawyer. Thus, some courts recognize that many litigants "have no more 'freedom of choice' as to legal representation than do prisoners."⁴⁴ A litigant's unrepresented status is often "not the product of choice," but "the result of necessity and economic reality"⁴⁵ Competent legal representation is beyond the means of even many middle class individuals, much less the indigent.⁴⁶ Moreover, decades of failed attempts to significantly increase pro bono participation and legal aid funding demonstrate that assuming increased attorney representation will solve the problem is a counterproductive pipedream even in the long run.⁴⁷ In the short run, individuals who cannot afford attorneys but are currently involved in the litigation are subject to injustice that simple adjustments by the court system could prevent.

Moreover, distinguishing between prisoners and other self-represented litigants "creates two classes of indigent litigants, those who are poor and law abiding, and those who are poor and not. It then affords lesser rights and protections to the former."⁴⁸ The effect of that distinction is that convicted felons are treated more solicitously in court than, for example, a woman seeking an order of protection.

Although some litigants do choose to appear without an attorney for reasons other than necessity and economic reality,⁴⁹ forbidding latitude for all self-represented litigants because some have made the "wrong" choice is unfair to the most vulnerable individuals in the courtroom, those who have no choice but to proceed without counsel. On the other hand, distinguishing between those who voluntarily choose to proceed pro se and those who have no choice would require an additional hearing on a party's assets and liabilities that would further complicate and delay proceedings and require a judge to make a decision about what a litigant's spending priorities should be. That distinction also creates four classes of litigants with procedures fluctuating depending on whether a party is represented, a pro se

43. See also, e.g., *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Circuit 1988); *Jacobsen v. Filler*, 790 F.2d 1362, 1364-65 (9th Circuit 1985); *Waushara County v. Graf*, 480 N.W.2d 16, 19 (Wisconsin 1992).

44. *Timms v. Frank*, 953 F.2d 281, 285 (7th Circuit 1992).

45. *Jacobsen v. Filler*, 790 F.2d 1362, 1367-68 (9th Circuit 1985) (Reinhardt, dissenting).

46. A 2003 study in Washington state, for example, reported that only 12% of low income people obtain the legal help they need, and the situation is hardly better for middle income people. Task Force on Civil Equal Justice Funding of the Washington State Supreme Court, *The Washington State Civil Needs Study* at 25(2003), www.courts.wa.gov/newsinfo/CivilLegalNeeds%20093003.pdf.

47. See M. Sue Talia, *Engaging the Private Bar: A Path to Reducing the Need for Self-Represented Litigation Support* (2005) and Michael Hertz and Karla Gray, *A Comment on Engaging the Private Bar: Other Paths* (2005), papers prepared for the National Summit on the Future of Self-Represented Litigation, available at www.selfhelpsupport.org.

48. *Jacobsen v. Filler*, 790 F.2d 1362, 1367 (9th Circuit 1985) (Reinhardt, dissenting).

49. Other factors include increased literacy rates; increased sense of consumerism; increased sense of individualism and belief in one's own abilities; anti-lawyer sentiment; a mistrust of the legal system; in criminal cases, a belief that the public defender is overburdened; a belief that the court will do what is right regardless whether the party is represented; a belief that litigation has been simplified so that attorneys are not needed; and a trial strategy designed to gain either sympathy or a procedural advantage over represented parties. Swank, "The Pro Se Phenomenon," 19 *Brigham Young University Journal of Public Law* 373, 378-79 (2005).

inmate, an unincarcerated pro se litigant who has no economic choice, and an unincarcerated pro se litigant who could afford an attorney if he or she chose. A judge's ethical obligations do not vary depending on whether the judge believes a litigant has made wise choices. The emphasis on choice also suggests that judges as lawyers may, unconsciously at least, be reflecting a resentment that laypersons would presume to represent themselves and not pay to hire attorneys, a consideration that is antithetical to maintaining impartiality.

Finally, focusing on the "choice" to appear pro se ignores that many people who appear without an attorney are not even in court by "choice" because they are the defendant or respondent in a case or because there is no other way to, for example, escape an abusive marriage, resolve conflicts about children, or appeal the denial of a workers compensation claim.

PROGRAMS

Despite the number of cases involving self-represented litigants and the number of programs developed to deal with the phenomena, there are very few judicial ethics advisory opinions that address such programs. The few opinions regarding pro se litigation indicate that judges may support such programs.

*Florida Advisory Opinion 93-8*⁵⁰ stated that a judge may assist pro se litigants by providing them with appropriate forms. The inquiring judge wanted to distribute a brochure entitled "Family Law Division, Pro Se Pointers" that was drafted to assist pro se litigants in uncontested dissolution of marriage cases. The brochure contained a checklist of 12 required documents with explanations of the forms and procedures necessary to obtain a final judgment. The opinion recognized "that particularly in urban courts there is an increasingly large number of pro se litigants seeking uncontested dissolutions of marriage. Judges in these urban family courts need to provide informational assistance to pro se litigants so that the judges can promptly dispense the business of the court" The opinion concluded that the brochure did not constitute the practice of law because it was generic and not directed toward specific litigants or cases. The opinion also stated that the brochure was an activity that improves the administration of justice. In addition, five members of the 10-member committee agreed a judge could provide an explanation on how to complete the forms and generally how to proceed in court.

*Arizona Advisory Opinion 88-5*⁵¹ advised that judges may allow court clerks to assist the public to fill out forms and pleadings as long as the judges cautioned the clerks not to give substantive advice but only clerical assistance. Clerks, the opinion noted, need to be careful not to advise the public as to its legal rights

50. www.jud6.org/LegalPractice/opinions/judicialethicsadvisoryopinions/Opinions.html.

51. www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Committee.htm.

and responsibilities or engage in the unauthorized practice of law. The committee concluded:

If clerks of the court were prohibited from lending assistance to the public, the result would be a judiciary that is only accessible to those individuals able to afford counsel. Clearly, such an effect would not be desirable nor constitutional. Furthermore, assistance in filling out forms is desirable by allowing for an efficient flow of an individual's case through the system.

Similarly, although *New York Advisory Opinion 88-36*⁵² stated that a judge should not assist a party to prepare pleadings, the opinion noted that it is not "intended to prohibit non-judicial personnel from extending appropriate assistance to *pro se* litigants."

Finally, *Indiana Advisory Opinion 1-97*⁵³ emphasized that, at least in a non-adversarial setting, where a *pro se* "litigant has failed in some minor or technical way, or on an uncontroverted or easily established issue, to submit every point technically required or which would be required from an attorney, the judge violates the Code by refusing to make any effort to help that litigant along, instead choosing to deny the litigant's request or relief."

For example, if a *pro se* litigant seeking a name change pays the required fees, submits proof of publication, establishes the basis for the request, but inadvertently or for lack of experience does not state an element which the judge requires, such as that the name change is not sought for a fraudulent purpose, the judge should make that simple inquiry during the litigant's presentation to the court rather than simply deny the petition on that basis alone. Neither the interests of the court nor of the litigant are served by rejecting the petition on the basis of this type of deficiency. Similarly, for example, a married couple seeking a divorce, each acting *pro se*, with no contest or issues in dispute, might unknowingly omit from their pleadings their county of residence. A judge should make inquiry of the parties to establish this element of their petition, and proceed appropriately, rather than deny the petition and excuse the parties from the courtroom on the basis of their omission.

The opinion concluded that "a judge's ethical obligation to treat all litigants fairly obligates the judge to ensure that a *pro se* litigant in a non-adversarial setting is not denied the relief sought only on the basis of a minor or easily established deficiency in the litigant's presentation or pleadings."

52. www.nycourts.gov/ip/judicialethics/.

53. www.in.gov/judiciary/admin/judqual/opinions.html.

DEMEANOR

“Judicial intemperance invariably conveys the message of a closed mind. . . . Participants will never accept that a decision rendered by a combatant is fair.”⁵⁴ A judge is required to treat self-represented litigants with the same patience, dignity, and courtesy mandated for everyone with whom the judge deals in an official capacity, and several judges have been sanctioned for failing to do so.⁵⁵ “People appearing pro se and without legal training are the ones least able to defend themselves against rude, intimidating, or incompetent judges.”⁵⁶

Judicial intemperance was found in a judge’s treatment of an unrepresented mother in a family court case beginning with his refusal to continue a hearing to allow her to obtain counsel even though she had appeared in court expecting the matter to be mediated or continued. The judge cut off the mother’s attempt to briefly cross-examine the father and did not give her an opportunity to present testimony or evidence. When the judge intimidated the parties’ daughter during questioning, she began to cry and the mother tried to comfort her, but the judge directed the mother to “just leave her alone and let her listen.” He threatened to transfer custody of the daughter to the father if the parties did not adhere to a visitation schedule, although the father did not request or want custody. After the judge directed the parties to agree to a schedule, the mother felt powerless to object but signed with the notation that she was agreeing under duress.

The Vermont Supreme Court explained: “We cannot let the judiciary become an impersonal and authoritarian institution, relying for legitimacy solely on its power. We can never tolerate the intemperate use of power; we must go out of our way to understand, explain and persuade.”⁵⁷ Moreover, the court emphasized that appropriate judicial demeanor is most significant in the adjudication of family matters.

The need for institutional acceptance and respect is highest in family matters, where the damage that can be inflicted by judicial rudeness and intemperance is the greatest. At the same time, we must acknowledge that the stresses on the judge are also heightened in family court. It takes superhuman patience to sit through a long day of personal conflict, exacerbated by raw emotion and attitudes that put greater effort on inflicting personal pain than on resolving disputes. The essence of judicial temperament, however, is the ability to diffuse emotional responses and facilitate reasonable ends, voluntarily accepted, especially where children are involved. Judicial intem-

54. *In re O’Dea*, 622 A.2d 507, 516 (Vermont 1993).

55. Canon 3B(4), American Bar Association Model Code of Judicial Conduct (1990). All states and the code of conduct for federal judges have a similar provision.

56. *In the Matter of Hammermaster*, 985 P.2d 924, 936 (Washington 1999).

57. *In re O’Dea*, 622 A.2d 507, 516 (Vermont 1993).

perance will only undermine the effectiveness of the decisions that the court renders.⁵⁸

In another discipline case, a judge's angry and sarcastic conduct in the courtroom was found to have intimidated self-represented litigants and discouraged some of them from presenting their testimony or their positions. On several occasions, the judge had warned pro se parties that if they "want to lose, annoy me" or "if you annoy me, that would be a bad thing" or words to that effect. The judge chastised, belittled, and berated several self-represented litigants and prevented some litigants from fully presenting their case by interrupting them without justification.⁵⁹

Another judge agreed that, in hindsight, his comments, tone, and manner to self-represented litigants in several cases could be perceived as inappropriate, harsh, or rude. The judge stated that he had not intended to humiliate the litigants but had been trying to ensure compliance with court rules and to convey the seriousness of the proceedings. The statement of charges had alleged that the judge repeatedly interrupted self-represented defendants; refused to allow them to answer his questions; and engaged in angry, disdainful, and/or protracted dialogues with them regarding the exercise of their rights, which was humiliating and intimidating.⁶⁰

Another judge admitted he should not have repeatedly admonished a litigant to obtain an attorney and made negative comments about the ability of pro se litigants.⁶¹ The judge stated that he had been "exasperated" with the litigant because she did not engage counsel when he thought she should and for her other conduct.⁶²

The code of judicial conduct also provides in Canon 3B(6) that a judge "shall require" patient, dignified and courteous conduct by "lawyers, and of staff, court officials and others subject to the judge's direction and control," which obliges a judge "to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control." That provision places an affirmative obligation on a judge both to set an example of courtesy toward self-represented litigants for others to follow and to ensure that court staff receive

58. *Id.* (public reprimand for this and other misconduct).

59. *In re Eiler*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct February 4, 2005) (www.cjc.state.wa.us) (reprimand; audio recording of portions of one hearing is on Commission web-site).

60. *In re Lukevich*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct December 1, 2000) (www.cjc.state.wa.us) (admonishment pursuant to agreement).

61. *In re O'Brien*, 650 A.2d 134 (Rhode Island 1994) (censure for this and other misconduct).

62. *Id.* at 137. See also *Inquiry Concerning Newton*, 758 So. 2d 107 (Florida 2000) (public reprimand pursuant to stipulation for, in addition to other misconduct, telling a self-represented litigant "she'd better be prepared, because she was not going to get by on her good looks" and responding "that is not good enough" when the litigant stated she was trying the best she could); *Inquiry Concerning Ormsby*, Decision and Order (California Commission on Judicial Performance March 20, 1996) (cjp.ca.gov) (censure pursuant to agreement for, among other misconduct, forcing an unrepresented litigant into unnecessary colloquy in open court regarding what he was learning in school and questioning him in a demeaning manner that was visibly embarrassing); *In re Hammermaster*, 985 P.2d 924 (Washington 1999) (censure and 6-month suspension without pay for, among other misconduct, threatening self-represented litigants who had not paid their fines with life imprisonment and indefinite jail sentences).

the training and supervision necessary to help them in the often difficult task of providing patient service to self-represented litigants. In addition, the provision requires judges to exercise their authority in the courtroom to prevent attorneys from bullying or misleading conduct meant to take advantage of a self-represented litigant.

According to the Massachusetts Court of Appeals, failure to intervene under those circumstances is an abdication of the proper role of a judge.⁶³ The court emphasized that it was not ruling that “a judge must become a lawyer for an unrepresented defendant,” but instructed judges to recognize when counsel opposing a self-represented litigant is “engaging in improper tactics and taking advantage of the defendant’s unrepresented status.”⁶⁴ In those circumstances, a judge’s prompt intervention is “not to be of assistance to the defendant, but to assert a judge’s traditional role of making sure that all the parties receive a fair trial.”⁶⁵

Similarly, the Indiana Supreme Court has warned that a trial court “cannot sit idly by” but “must be especially acute and vigilant in governing the conduct of counsel and witnesses” and “actively direct the course of the trial so as to protect the ultimate purpose of that trial. . . .”⁶⁶

The Proposed Best Practices contains the following suggestions on how to run a courteous courtroom in cases involving self-represented litigants:

9. Start court on time (required in all cases); if delay is unavoidable, apologize and offer a brief explanation.
10. Explain to self-represented litigants that the rude conduct displayed on television shows like *Judge Judy* is not acceptable in a real courtroom, either from them or directed to them.
11. Treat self-represented litigants with patience, dignity, and courtesy (required toward all participants in all court proceedings).
 - Do not make comments or use a tone and manner that are rude, intimidating, harsh, threatening, angry, sarcastic, discouraging, belittling, humiliating, or disdainful.
 - Do not interrupt self-represented litigants unless necessary to control proceedings or prevent discourtesy.
 - Do not engage in protracted dialogues or make off-hand, negative comments regarding their pro se status.
 - Address self-represented litigants with titles comparable to those used for counsel.
 - Avoid over-familiar conduct toward attorneys (for example, using first names, sharing in-jokes, referring to other proceedings or bar

63. *Commonwealth v. Sapoznik*, 549 N.E.2d 116, 120 n.4 (Massachusetts Appeals Court 1990).

64. *Id.*

65. *Id.*

66. *Grubbs v. State*, 265 N.E.2d 40, 43-44 (Indiana 1970).

- events, inviting attorneys into chambers, chatting casually before or after court proceedings).
12. Require court staff and attorneys to treat self-represented litigants (and everyone else) with patience, dignity, and courtesy.
 13. Pay attention and act like you are paying attention.
 - If you take notes or refer to books or information on a computer screen during a proceeding, explain what you are doing so the litigants understand that they have your attention.

APPEARANCE OF BIAS

Another unquestioned obligation of a judge toward self-represented litigants is to avoid creating the appearance of bias in favor of attorneys or represented parties. Respectful demeanor toward all participants in court proceedings is the primary method of ensuring self-represented litigants do not experience or perceive bias, particularly by refraining from harping on a litigant's pro se status and by addressing self-represented "with titles connoting equal respect to that afforded opposing counsel."⁶⁷

Moreover, conduct commissions indicate they receive many complaints after pro se parties observe the judges in their cases engaged with attorneys in conversations that exclude them. The Wyoming Commission on Judicial Conduct and Ethics thought it important to bring this matter to the attention of the judges of the state.

Pro se litigants . . . may be waiting in the hall for their respective proceedings. It is during these times that many judges and attorneys are seen conversing and laughing with one another before or even after court proceedings. Attorneys who may be personal friends of the judge are often invited to the judge's chambers for coffee. It is precisely this seemingly benign behavior that makes a judge subject to the appearance of impropriety. Citizens often view this innocent exchange of conversation as a discussion of their case without the benefit of knowing what is said.

* * *

The average citizen does not fully understand the legal system and why it works the way it does. Most citizens who appear in court are usually there on a one-time-only basis. It is from this first and perhaps only experience, that a citizen forms an opinion of the judicial system — be it good or bad. That opinion can undoubtedly have a snowball effect. Through the public grapevine, a citizen can plant the seed for perceived favorable or unfavorable treatment by the courts and the

67. *Commonwealth v. Jackson*, 647 N.E.2d 401, 405 (Massachusetts 1995).

attorneys, thus, in turn, prompting a barrage of complaints against judges and attorneys. Improved localized communication may help citizens to better understand and respect the judicial and legal system. The experience of the Commission is that when a citizen sees a judge and an attorney talking outside the courtroom, a citizen is most likely to think the worst. Thought should be given to conducting these courthouse social conversations at other more appropriate times and out of view of the public. . . . The judge and the attorney may be talking about current events, but the citizen does not know that, and this might be a simple way to avoid creating an appearance of impropriety or bias.⁶⁸

Similarly, the Alabama Judicial Inquiry Commission has warned that “judges should not create an appearance that a represented party is in a special position to influence him (Canon 2C). Calling a represented party’s attorney by his or her first name, or granting the attorney casual access to judicial chambers, may give an improper impression to an unrepresented opponent.”⁶⁹

TECHNICALITIES

Taking pains to protect self-represented litigants against the consequences of technical errors is one of the accommodations courts have approved for self-represented litigants to prevent “inadvertent forfeiture of important rights because of their lack of legal training.”⁷⁰ “Legal technicalities must. . . be tempered by justice.”⁷¹ “Once a pro se litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel.”⁷²

Thus, judges have been warned not to harshly or inflexibly apply technical rules to self-represented litigants⁷³ or to sanction self-represented litigants for “a

68. Collins, “Are You Guilty of the Appearance of Impropriety?” 26 *Wyoming Lawyer* 16 (April 2003).

69. Childers, “Conduct Challenges With the Pro Se Litigants,” Alabama Judicial Inquiry Commission *Judicial Conduct Letter* (summer 2004), reprinted in *Judicial Conduct Reporter* (AJS spring 2005). See also *Kennick v. Commission on Judicial Performance*, 787 P.2d 591 (California 1990) (finding violation of code of judicial conduct where judge “met privately with [two] attorneys in chambers on days when the attorneys were appearing before [him] as counsel in a case on his calendar, thereby giving the appearance of impropriety”); *In re Slusher*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct April 1, 1994) (www.cjc.state.wa.us) (finding violation of code of judicial conduct where judge engaged in a casual and cordial conversation in the courtroom with one of the parties in a case that the other party observed).

70. *Traguth v. Zuck*, 710 F.2d 90, 95 (2nd Circuit 1983). See also *Lombardi v. Citizens National Trust & Savings Bank*, 289 P.2d 823, 824 (California 2nd District Court of Appeal 1955) (judge has duty to see that a self-represented litigant’s cause is not defeated by mere inadvertence or want of attention).

71. *Rappleyea v. Campbell*, 884 P.2d 126, 132 (California 1994) (Arabian, concurring).

72. *Ortiz v. Cornetta*, 867 F.2d 146, 148 (2nd Circuit 1989).

73. *Traguth v. Zuck*, 710 F.2d 90, 95 (2nd Circuit 1983); *Frankos v. LaVallee*, 535 F.2d 1346, 1347 (2nd Circuit 1976), cert. denied, 429 U.S. 918 (1976); *Martinez-McBean v. Government of Virgin Islands*, 562 F.2d 908, 912 (3rd Circuit 1977).

procedural misstep here or there.”⁷⁴ Instead, they have been encouraged “to overlook, in the interest of justice and the speedy adjudication of claims, minor errors in the adherence to court rules and procedures”⁷⁵ and to grant self-represented litigants leniency in technical matters and mere formalities.⁷⁶

The United States Court of Appeals for the 2nd Circuit, for example, held that it was an abuse of discretion for a trial court to dismiss a complaint that failed to include a caption, identified cause of action, and prayer for relief where those failures did not interfere with the defendant’s ability to understand the claims or otherwise prejudice the adverse party.⁷⁷ Similarly, the United States Court of Appeals for the 9th Circuit held that a claimant’s technical non-compliance with the rule regarding service of process on officers of the United States did not mandate dismissal.⁷⁸

The Proposed Best Practices contains the following suggestion regarding technicalities in cases involving self-represented litigants:

21. Follow the principle that cases should be disposed of on the merits, rather than with strict regard to technical rules of procedure.

PROVIDING CLEAR EXPLANATIONS

There are several actions that judges unquestionably can take in cases involving self-represented litigants – and, therefore, arguably should take – without raising reasonable questions about impartiality under the code of judicial conduct.

For example, nothing in the code of judicial conduct (or elsewhere) requires a judge to use the jargon, abbreviations, acronyms, shorthand, and slang that frequently mark communications among legal professionals but inevitably leave a self-represented litigant feeling confused and left out. Moreover, the careless use of jargon may mislead a self-represented litigant and ultimately result “in not only a miscarriage of justice, but the undermining of confidence in the judicial system.”⁷⁹ On the other hand, a judge’s eschewing of legalese neither gives an advantage to self-represented litigants nor prejudices represented litigants.

Thus, a judge should take “affirmative steps” in cases involving a self-represented litigant, “for example, spending a few minutes editing a letter or minute order from the court — to make sure any communication . . . is clear, understand-

74. *Lundahl v. Quinn*, 67 P.3d 1000, 1002 (Utah 2003).

75. *Cassell v. Shellenberger*, 514 A.2d 163, 165 (Pennsylvania Superior Court 1986), *appeal denied*, 529 A.2d 1078 (1987).

76. *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Florida 4th District Court of Appeal 1999); *Griffin v. Unemployment Appeals Commission* 868 So. 2d 1262, 1264 (Florida 4th District Court of Appeal 2004).

77. *Phillips v. Girdich*, 408 F.3d 124, 129-30 (2nd Circuit 2005).

78. *Borzeka v. Heckler*, 739 F.2d 444, 447 n.2 (9th Circuit 1984).

79. *Gamet v. Blanchard*, 111 Cal. Rptr. 2d 439, 446 (California 4th District Court of Appeal 2001).

able, and does not require translation into normal-speak.”⁸⁰ This would include making a self-represented litigant aware of the possible consequences of violating an order entered by the court, for example, that violation of an order to appear for a deposition may result in a dismissal with prejudice,⁸¹ and providing a self-represented litigant with a notice of trial that describes the nature of proceedings in unambiguous terms.⁸² Taking special care to make sure that verbal instructions and written notices are clear and understandable by a layperson “is the essence of equal and fair treatment,” and it “is not only important to serve the ends of justice, but to maintain public confidence in the judicial system.”⁸³

Furthermore, “notions of simple fairness” suggest that a judge should give an explanation for a ruling to a self-represented litigant, if not to every litigant.⁸⁴ Giving a rationale for a decision is inherently part of the duty of a judge, and doing so in a case involving a self-represented litigant could not reasonably be considered evidence of partiality. That is true even if explaining the basis for a ruling incidentally assists a self-represented litigant to prepare an amended pleading.⁸⁵ By explaining a ruling either in writing or orally on the record, a judge avoids conveying to self-represented litigants “the impression that their efforts to studiously prepare their case were not worthy of comment” or that the judge is biased towards the other side.⁸⁶

Indeed, if judges undertake in every case the challenge of explaining their actions in a way that is comprehensible to non-lawyers, they will ensure that their orders and decisions are understood not just by self-represented litigants but by poorly represented litigants, inexperienced lawyers, represented litigants, the public, and the media. Such a result cannot help but improve party and public confidence in the justice system without any sacrifice of impartiality or the appearance of impartiality.

The Proposed Best Practices contains the following suggestions regarding providing clear explanations in cases involving self-represented litigants:

17. Give the rationale for a decision either in writing or orally on the record.
18. When announcing a decision or entering an order, do not use legal jargon, abbreviations, acronyms, shorthand, or slang.
19. If possible, after each court appearance, provide all litigants with clear written notice of further hearings, referrals, or other obligations.
20. Ensure that all orders (for example, regarding discovery) clearly explain the possible consequences of failure to comply.

80. *Id.*

81. *Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759, 763 (2nd Circuit 1990), *cert.denied*, 499 U.S. 943 (1991).

82. *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983) (reversing judgment for plaintiff where notice of trial described nature of proceedings against unrepresented defendant in such ambiguous terms that it deprived him of adequate time to prepare for his defense in violation of his right to due process).

83. *Gamet v. Blanchard*, 111 Cal. Rptr. 2d 439, 446 (California 4th District Court of Appeal 2001).

84. *Lucas v. Miles*, 84 F.3d 532, 535 (2nd Circuit 1996).

85. *Paulson v. Evander*, 633 So. 2d 540, 541 (Florida 5th District Court of Appeal, 1994).

86. *Schulz v. Warren County Board of Supervisors*, 581 N.Y.S.2d 885, 888 (New York Supreme Court, Appellate Division, 3rd Department), *leave to appeal denied*, 600 N.E.2d 633 (1992).

* * *

31. Ensure that the notice of hearing unambiguously describes in a way a self-represented litigant can understand that a hearing on the merits is being scheduled and the litigant should be prepared with evidence and witnesses to present the case or defense.

LIBERAL CONSTRUCTION

Judges are not simply allowed but required to liberally construe pleadings filed by self-represented litigants. In fact, this is not a special accommodation for self-represented litigants but simply an application of the rule applied to all pleadings in the modern notice-pleading practice.⁸⁷ Even less stringent standards are permissible for self-represented litigants.⁸⁸

That injunction applies to all types of pleadings, including briefs, but most importantly when dismissal of a complaint is considered.⁸⁹ A judge should not dismiss a complaint drafted by a self-represented litigant unless it appears beyond doubt that the plaintiff cannot prove any set of facts that will support a claim that would entitle the plaintiff to relief.⁹⁰ The goal of liberal construction is to “credit not so well pleaded allegations” so that a self-represented litigant’s meritorious complaint will not be lost because it is inartfully drafted,⁹¹ to afford a self-represented litigant every reasonable opportunity to demonstrate that he or she has a valid claim,⁹² and to ensure that a self-represented litigant is not “precluded from resorting to the courts merely for want of sophistication.”⁹³ A judge should construe a self-represented litigant’s complaint in a way that permits the litigant’s claim to be considered within the proper legal framework “if the essence of an allegation is discernible, even though it is not pleaded with legal nicety,”⁹⁴ affording a self-represented litigant the benefit of any doubt.⁹⁵

The liberal construction rule requires that a judge give effect to the substance, rather than the form or terminology, of a self-represented litigant’s papers.⁹⁶ A

87. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Phillips v. Girdich*, 408 F.3d 124, 129-30 (2nd Circuit 2005).

88. *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980); *Haines v. Kerner*, 404 U.S. 519, 520, (1972); *Phillips v. Girdich*, 408 F.3d 124, 129-30 (2nd Circuit 2005); *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1368 (11th Circuit 1998); *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987), *cert. denied*, 485 U.S. 1023 (1988); *Wright v. Shorten*, 964 P.2d 441, 444 (Alaska 1998); *Kaiser v. Sakata*, 40 P.3d 800, 803 (Alaska 2002); *Gilbert v. Nina Plaza Condo Association*, 64 P.3d 126, 129 (Alaska 2003); *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tennessee Court of Appeals 2000); *Paehler v. Union Planters National Bank*, 971 S.W.2d 393, 397 (Tennessee Court of Appeals 1998).

89. *Garaux v. Pulley*, 739 F.2d 437, 438-39 (9th Circuit 1984); *Lucas v. Department of Corrections*, 66 F.3d 245 (9th Circuit 1995).

90. *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

91. *Moore v. Ruth*, 556 So. 2d 1059, 1062 (Mississippi 1990).

92. *Satchell v. Dilworth*, 745 F.2d 781, 785 (2nd Circuit 1984).

93. *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Circuit 1991).

94. *Stone v. Harry*, 364 F.3d 912, 915 (8th Circuit 2004).

95. *Klingele v. Eikenberry*, 849 F.2d 409, 413 (9th Circuit 1988).

96. *Brown v. City of Manchester*, 722 S.W.2d 394, 397 (Tennessee Court of Appeals 1986); *Usrey v. Lewis*, 553 S.W.2d 612, 614 (Tennessee Court of Appeals 1977).

judge should look beyond the label that a self-represented litigant attaches to a pleading and re-characterize it to correspond to the substance and underlying legal basis of the claim.⁹⁷ Thus, for example, a judge should treat as an answer a document titled “Motion to Dismiss on Plea of Res Adjudicata”⁹⁸ or a timely letter that responds to the allegations in a petition and provides fair notice of the defense,⁹⁹ and may re-characterize a habeas corpus complaint as a civil rights claim if it names the correct defendants and seeks the correct relief.¹⁰⁰

In addition, liberal construction requires that a judge overlook that a self-represented litigant’s pleadings may not be “neatly parsed” and may include “a great deal of irrelevant detail.”¹⁰¹ A judge should also ignore poor syntax and sentence construction¹⁰² (probably occasionally necessary even in pleadings filed by attorneys). The duty to liberally construe a self-represented litigant’s pleadings includes a duty to consider allegations found in other documents filed by the litigant.¹⁰³

Moreover, the liberal construction rule means that a judge should apply the relevant law regardless whether a self-represented litigant has mentioned it by name.¹⁰⁴ Although a court cannot create a claim or a defense for a self-represented litigant where none exists,¹⁰⁵ a judge should interpret a self-represented litigant’s papers to raise the strongest arguments they suggest¹⁰⁶ and to give effect to a pleading in conformity with the general theory that it was intended to follow.¹⁰⁷ Furthermore, the liberal construction rule “means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff’s failure to cite proper legal authority [and] his confusion of various legal theories”¹⁰⁸

The United States Court of Appeals for the 2nd Circuit has noted that, under the federal rules of civil procedures, a plaintiff is not required “to plead the legal theory, facts, or elements underlying his claim.”

97. *Castro v. United States*, 540 U.S. 375, 382 (2003).

98. *Usrey v. Lewis*, 553 S.W.2d 612, 614 (Tennessee Court of Appeals 1977).

99. *Wright v. Shorten*, 964 P.2d 441, 444 (Alaska 1998). See also *Kennedy v. First Bank of Fairbanks*, 637 P.2d 297, 298 (Alaska 1981) (refusal to set aside default was abuse of discretion where self-represented debtor’s prompt response to complaint, although technically inadequate to prevent entry of default, was due to lack of familiarity with rules and not gross neglect and the adequacy of the creditor’s case against the debtor was debatable).

100. *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Circuit, 2005). The court instructed judges to warn pro se litigants “of the consequences of the conversion and provide[] an opportunity for the litigant to withdraw or amend his or her complaint.”

101. *Phillips v. Girdich*, 408 F.3d 124, 129-30 (2nd Circuit 2005).

102. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Circuit 1991).

103. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Howard v. King*, 707 F.2d 215, 220 (5th Circuit 1983); *Moore v. Florida*, 703 F.2d 516, 521 (11th Circuit 1983); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Circuit 1981); *Wright v. El Paso County Jail*, 642 F.2d 134, 135 (5th Circuit 1981); *Matzker v. Herr*, 748 F.2d 1142, 1148 n.5 (7th Circuit 1984).

104. *Holley v. Department of Veteran Affairs*, 165 F.3d 244, 247-48 (3rd Circuit 1999) (self-represented plaintiff’s complaint should not have been dismissed for citing wrong statutory provision); *Dluhos v. Strasberg*, 321 F.3d 365, 373 (3rd Circuit 2003).

105. *Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tennessee Court of Appeals 1994).

106. *Burgos v. Hopkins*, 14 F.3d 787, 790 (2nd Circuit 1994).

107. *Hill v. Williams*, 813 A.2d 130, 132 (Connecticut Appellate Court 2003), *cert. denied*, 222 A.2d 242 (Connecticut 2003) (giving effect to allegations sounding in contract as well as those sounding in tort).

108. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Circuit 1991).

This is especially true in the case of *pro se* litigants, who cannot be expected to know all of the legal theories on which they might ultimately recover. It is enough that they allege that they were injured, and that their allegations can conceivably give rise to a viable claim. . . . In [determining what claims have been raised], the court's imagination should be limited only by [the plaintiff's] factual allegations, not by the legal claims set out in his pleadings.¹⁰⁹

Thus, the liberal construction rule means a judge should not ignore any obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly invoke that theory. However, it does not mean a trial judge has "to conjure up questions never squarely presented to them."¹¹⁰

District judges are not mind readers. Even in the case of *pro se* litigants, they cannot be expected to construct full blown claims from sentence fragments To do so would not only strain judicial resources by requiring those courts to explore exhaustively all potential claims of a *pro se* plaintiff, but would also transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party.¹¹¹

Moreover, the liberal construction rule does not relieve a self-represented litigant of the responsibility of making sufficient factual allegations to give the other side fair notice of the claim or request.¹¹² Although not every fact must be described in specific detail,¹¹³ a self-represented plaintiff "requires no special legal training to recount the facts surrounding his alleged injury"¹¹⁴ Thus, a judge does not have discretion to overlook when a complaint does not allege a sufficient factual basis to give a defendant adequate notice of the circumstances surrounding the controversy.¹¹⁵ Moreover, a judge should not infer, assume, or supply facts to round out a plaintiff's complaint¹¹⁶ or accept conclusory allegations.¹¹⁷ Further, the liberal construction rule does not give a judge "license to . . . rewrite an otherwise deficient pleading in order to sustain an action."¹¹⁸

109. *Phillips v. Girdich*, 408 F.3d 124, 129-30 (2nd Circuit 2005).

110. *Beaudett v. City of Hampton*, 775 F.2d 1274, 1276 (4th Circuit 1985), *cert. denied*, 475 U.S. 1088 (1986).

111. *Id.* at 1277-78. However, if subsequent proceedings "reveal that ambiguous fragments in the complaint represent the heart of a litigant's concern," a district court should consider those additional claims.

112. *Commonwealth v. Miller*, 416 S.W.2d 358, 360 (Kentucky 1967); *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Kentucky 1983).

113. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

114. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Circuit 1991).

115. *Cassell v. Shellenberger*, 514 A.2d 163, 165 (Pennsylvania Superior Court 1986).

116. *Stone v. Harry*, 364 F.3d 912, 915 (8th Circuit 2004); *Whitney v. State of New Mexico*, 113 F.3d 1170, 1174 (10th Circuit 1997).

117. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Circuit 1991).

118. *See GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1368 (11th Circuit 1998); *Paulson v. Evander*, 633 So. 2d 540, 541 (Florida 5th District Court of Appeal 1994).

Moreover, the liberal construction rule does not require or even permit a judge to apply a more sympathetic view of the substantive law and to relieve a self-represented litigant of the usual burden of proof or standard of proof. In a fraud case, for example, if the plaintiff did not allege or prove by clear and convincing evidence that the defendant misrepresented a material fact during the transaction, a judge must rule in favor of the defendant however underhanded the judge may consider the defendant and however legitimate the self-represented plaintiff's outrage may be.

The Proposed Best Practices contains the following suggestions regarding liberal construction of pleadings in cases involving self-represented litigants:

14. Construe pleadings liberally.

- Look behind the label of a document filed by a self-represented litigant and give effect to the substance, rather than the form or terminology.
- Do not ignore an obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly refer to that theory.
- Consider information in other documents filed by a self-represented litigant.
- Allow amendment freely.

LIBERAL AMENDMENT

Self-represented litigants must be freely afforded an opportunity to amend a complaint to add sufficient factual allegations, although, again, this is not a special accommodation for self-represented litigants but a requirement in all cases.¹¹⁹ “The rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel.”¹²⁰

A judge should not dismiss a complaint filed by a self-represented litigant without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.¹²¹ A self-represented plaintiff whose factual allegations are “close to stating a claim but are missing some important element that may not have occurred” to the litigant should be allowed to amend the complaint,¹²² “particularly where the deficiencies are attributable to

119. *Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759, 763 (2nd Circuit 1990), *cert denied*, 499 U.S. 943 (1991); *Satchell v. Dikworth*, 745 F.2d 781, 785 (2nd Circuit 1984); *Traguth v. Zuck*, 710 F.2d 90, 95 (2nd Circuit 1983).

120. *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Circuit 1987).

121. *Branum v. Clark*, 927 F.2d 698, 705 (2nd Circuit 1991).

122. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Circuit 1991).

oversights likely the result of an untutored pro se litigant's ignorance of special pleading requirements."¹²³ For example, dismissal should be without prejudice and with leave to amend to give a self-represented litigant an opportunity to attempt to allege an injury¹²⁴ or to name the proper parties.¹²⁵

Moreover, in dismissing a complaint with leave to amend, a trial judge has the duty to "draft a few sentences" explaining the deficiencies in a self-represented litigant's allegations to help ensure that the litigant can use the opportunity to amend effectively without simply repeating previous errors.¹²⁶ A judge must do more "than simply advise the pro se plaintiff that his complaint needs to be shorter and more concise,"¹²⁷ but the "statement of deficiencies need not provide great detail or require district courts to act as legal advisors to pro se plaintiffs"¹²⁸ For example, a judge is required to point out if the dismissal of a civil rights complaint is based on the failure to allege that the defendant acted under color of state law¹²⁹ or to allege receipt of a right-to-sue letter.¹³⁰

The United States Court of Appeals for the 9th Circuit in *Noll v. Carlson* held that a trial judge abused his discretion by dismissing a self-represented prisoner's second amended complaint without leave to amend where his previous amendments were "without the benefit of the court notifying him of any deficiencies in his previous pleadings."¹³¹ Stating it was not absolutely clear that the plaintiff could not amend his complaint to allege constitutional violations, the court noted, for example, that although his allegations that he was placed in prison with "known enemies" were conclusory, "he may be able to amend his complaint to allege facts showing that prison officials acted with 'deliberate indifference' to his physical safety in violation of the eighth amendment."¹³²

However, a judge is not required to give a self-represented litigant unlimited chances to successfully amend a complaint. In *Barrett v. City of Margate*,¹³³ the Florida Court of Appeals upheld the dismissal with prejudice of the plaintiffs' third amended complaint. The trial judge had twice granted the self-represented plaintiffs leave to amend a complaint that had not set forth a short and plain statement of the ultimate facts showing entitlement to relief, contrary to the rules of civil procedure. The trial judge had advised them to set forth a "short concise statement of the facts" and warned them that their action would not survive if the complaint was not sub-

123. *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Circuit 1990).

124. *Davis v. Goord*, 320 F.3d 346, 352 (2nd Circuit 2003).

125. *Soto v. Walker*, 44 F.3d 169 (2nd Circuit 1995).

126. *Eldridge v. Block*, 832 F.2d 1132, 1136-37 (9th Circuit 1987). See also *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Circuit 1987); *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 624 (9th Circuit 1988); *Collins v. Arctic Builders*, 957 P.2d 980, 982 (Alaska 1998).

127. *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 625 (9th Circuit 1988).

128. *Eldridge v. Block*, 832 F.2d 1132, 1136 (9th Circuit 1987).

129. *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Circuit 1987).

130. *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 627 (9th Circuit 1988).

131. *Noll v. Carlson*, 809 F.2d 1446, 1449 (9th Circuit 1987).

132. *Id.* at 1449 n.4. See also *Eldridge v. Block*, 832 F.2d 1132, 1136-37 (9th Circuit 1987) (dismissal of amended complaint was abuse of discretion where initial complaint was dismissed for failure to comply in form with local rules of court in form without an explanation of how the complaint was deficient).

133. 743 So. 2d 1160 (Florida 4th District Court of Appeal 1999).

stantially edited. Finding the plaintiffs' third amended complaint to be "manuscript in size" and contrary to the pleading standards previously explained, the trial judge dismissed the third amended complaint with prejudice.

The appellate court stated that "although there is no magical number of amendments which are allowed, dismissal of a complaint that is before the court on a third attempt at proper pleading is generally not an abuse of discretion."¹³⁴

It is not permissible for any litigant to submit a disorganized assortment of allegations and argument in hope that a legal premise will materialize on its own. The trial court provided the [plaintiffs] with appropriate direction and reasonable opportunities to cure the deficiencies in their pleadings. The [plaintiffs'] convoluted, verbose, narrative style pleading, coupled with their refusal to comply with either the trial court's directives or the mandate of [the rules of civil procedure] clearly demonstrates the need for the rule and exemplifies the potential for abuse of the judicial process when the rule is not enforced.¹³⁵

The Proposed Best Practices contains the following suggestion regarding amendment of pleadings in cases involving self-represented litigants:

15. Give a self-represented litigant notice of any substantive defect in a pleading and an opportunity to remedy the defect unless it is absolutely clear that no adequate amendment is possible.

EXPLAINING THE PROCESS

One of the recommended accommodations for cases with pro se litigants is to explain to all parties in the case how the proceedings will be conducted.¹³⁶ The Minnesota Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants,¹³⁷ for example, suggests that a judge explain the process,¹³⁸

¹³⁴ *Id.* at 1162.

¹³⁵ *Id.* at 1163.

¹³⁶ *See, e.g.,* Albrecht, Greacen, Hough, Zorza, "Judicial Techniques for Cases Involving Self-Represented Litigants," 41 *Judges' Journal* 16, 45 (ABA winter 2003).

¹³⁷ *See* ajs.org/prose/pdfs/Proposed_Protocol.pdf. The protocol was proposed by the Minnesota Conference of Chief Judges Pro Se Implementation Committee.

¹³⁸ "For example, 'I will hear both sides in this matter. First I will listen to what the Petitioner wants me to know about this case and then I will listen to what the Respondent wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence. Everything that is said in court is written down by the court reporter and in order to insure that the court record is accurate, only one person can talk at the same time. Wait until the person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question.'"

the elements,¹³⁹ that the party bringing the action has the burden to present evidence in support of the relief sought,¹⁴⁰ the kind of evidence that may be presented,¹⁴¹ and the kind of evidence that cannot be considered.¹⁴² The Minnesota Protocol then directs the judge to “ask both parties whether they understand the process and the procedure.”

It does not raise reasonable questions about a judge’s impartiality for the judge to ensure that all the litigants, represented and unrepresented alike, understand how the proceedings will unfold. It may eliminate confusion on the part of a self-represented litigant that normally benefits a represented party, but attorneys or represented litigants cannot argue that they have a right to a clueless opponent if the opponent is unrepresented. Moreover, the caselaw demonstrates that there can be no objection on ethical or other grounds to a judge explaining procedures.

The Indiana Supreme Court, for example, instructed trial judges in cases involving self-represented litigants to continually bring to the litigant’s attention “that important procedural points in the trial have been reached,” for example, when the accused should question a prospective juror, cross examine a witness, or make opening and closing statements. The court stated, “only by vigorously assuming this responsibility can there be any assurance that the trial will serve the purposes for which it is held.”¹⁴³

Similarly, the Illinois Appellate Court noted that, in order for a trial involving a self-represented litigant to proceed with fairness, a judge “must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.”¹⁴⁴ Courts have also held that a judge should pro-

139. “For example, in Order for Protection (OFP) cases: ‘Petitioner is requesting an Order for Protection. An Order for Protection will be issued if Petitioner can show that she is the victim of domestic abuse. Domestic abuse means that she has been subject to physical harm or that she was reasonably in fear of physical harm or that she was reasonably in fear of physical harm as a result of the conduct or statements of the Respondent. Petitioner is requesting a Harassment Restraining Order. A Harassment Restraining Order will be issued if Petitioner can show that she is the victim of harassment. Harassment means that she has been subject to repeated, intrusive, or unwanted acts, words, or gestures by the Respondent that are intended to adversely affect the safety, security, or the privacy of the Petitioner.’”

140. “For example, in OFP cases: ‘Because the Petitioner has requested this order, she has to present evidence to show that a court order is needed. I will not consider any of the statements in the Petition that has been filed in this matter. I can only consider evidence that is presented in court today. If Petitioner is unable to present evidence that an order is needed, then I must dismiss this action.’”

141. “Evidence can be in the form of testimony from the parties, testimony from witnesses, or exhibits. Everyone who testifies will be placed under oath and will be subject to questioning by the other party. All exhibits must first be given an exhibit number by the court reporter and then must be briefly described by the witness who is testifying and who can identify the exhibit. The exhibit is then given to the other party who can look at the exhibit and let me know any reason why I should not consider that exhibit when I decide the case. I will then let you know whether the exhibit can be used as evidence.”

142. “I have to make my decision based upon the evidence that is admissible under the Rules of Evidence for courts in Minnesota. If either party starts to present evidence that is not admissible, I may stop you and tell you that I cannot consider that type of evidence. Some examples of inadmissible evidence are hearsay and irrelevant evidence. Hearsay is a statement by a person who is not in court as a witness: hearsay could be an oral statement that was overheard or a written statement such as a letter or an affidavit. Irrelevant evidence is testimony or exhibits that do not help me understand or decide issues that are involved in this case.”

143. *Grubbs v. State*, 265 N.E.2d 40, 44 (Indiana 1970).

144. *Oko v. Rogers*, 466 N.E.2d 658, 661 (Illinois 3rd District Appellate Court 1984).

vide a self-represented litigant with meaningful notice of what is expected of him or her¹⁴⁵ and advise a self-represented litigant of the right to cross-examine witnesses and to produce witnesses.¹⁴⁶

Descriptions in appellate cases indicate that many trial court judges are already outlining the proceedings for self-represented litigants with no suggested adverse effect on their impartiality. The appellate courts speak approvingly of these efforts without censure (although, as the efforts are discussed in the context of rejecting a self-represented litigant's argument that even more leniency should have been shown, there is no explicit holding that the accommodations are required or permitted).

For example, rejecting a self-represented litigant's claim that a trial judge's "frustration with the *pro se* representation prevented him from being an impartial fact finder in this jury-waived trial," the United States Court of Appeals for the 1st Circuit stated that the judge treated the self-represented litigant "with respect and compassion and bent over backwards to explain . . . the legal principles which formed the basis for his evidentiary rulings."¹⁴⁷ Similarly, the Minnesota Appellate Court noted that a trial judge had "explained, and appellant understood, the necessity of presenting evidence at trial," before concluding that the trial judge did not err by finding that appellant failed to prove her claim by a preponderance of the evidence.¹⁴⁸

The New Hampshire Supreme Court commended the way a judge conducted a trial in a quiet title action and rejected the self-represented plaintiff's charge of bias. The court noted that the trial judge had "made a special effort to explain to the plaintiff proper courtroom procedures in order to facilitate the plaintiff's presentation of his case."¹⁴⁹ Similarly, rejecting a *pro se* litigant's argument that he was entitled to special assistance, the Alaska Supreme Court held that the trial court had gone far enough by advising the litigant of procedures and attempting to focus his attention on the relevant issues at the hearing.¹⁵⁰

The Proposed Best Practices contains the following suggestions for judges regarding explaining the process in cases involving self-represented litigants:

5. Give a basic introduction to courtroom protocol, for example, the importance of timeliness, checking in with the clerk (if that is necessary), who sits where, directing arguments to you, not other parties or attorneys, rising when you enter, and other matters you consider important (attire, gum chewing, reading while court is in session, etc.).

145. *Schooley v. Kennedy*, 712 F.2d 372, 373-74 (8th Circuit 1983).

146. *Silvestris v. Silvestris*, 265 N.Y.S.2d 173 (New York Supreme Court, Appellate Division, 1st Department 1965).

147. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 138 (1st Circuit 1985), *cert. denied*, 476 U.S. 1172 (1986).

148. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 120 (Minnesota Court of Appeals 2001).

149. *Austin v. Ellis*, 408 A.2d 784, 785 (New Hampshire 1979).

150. *Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265, 1273 (Alaska 2001).

* * *

27. Explain the process and ground rules (e.g., that you will hear from both sides, who goes first, everything said will be recorded, witnesses will be sworn in, witnesses may be cross-examined, how to make an objection).
28. Explain the elements and the burden of proof.
29. Explain the kinds of evidence that can be presented and the kinds of evidence that cannot be considered.
 - Explain that you will make your decision based only on the evidence presented.
 - Encourage the parties to stipulate to uncontested facts and the admission of as much of the documentary evidence as possible.

INSTRUCTING SELF-REPRESENTED LITIGANTS

In most jurisdictions that have addressed the issue, a judge has a duty in all cases to ensure that a self-represented litigant has been informed how to properly respond to a motion for summary judgment.¹⁵¹ If opposing counsel has not provided the necessary notice (as required by the federal rule and rules in many states), the failure of the judge to do so prior to entering summary judgment ordinarily results in reversal.¹⁵² The rationale for the rule is that the necessity for a response might only not be obvious to a layperson but contrary to intuition and “it would not be realistic to impute to [a self-represented litigant] an instinctual awareness that the purpose of a motion for summary judgment is to head off a full-scale trial . . . so that not submitting counter affidavits is the equivalent of not presenting any evidence at trial.”¹⁵³

The required notice informs the litigant that the failure to respond to the motion for summary judgment might result in entry of judgment against him or her¹⁵⁴ and that, absent a response, the factual assertions of the movant’s affidavits

151. This rule has been applied in both prisoner and non-prisoner cases. *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Circuit 1968) (prisoner); *Vital v. Interfaith Medical Center*, 168 F.3d 615 (2nd Circuit 1999) (not a prisoner); *Ruotolo v. Internal Revenue Service*, 28 F.3d 6 (2nd Circuit 1994) (not a prisoner); *Irby v. New York City Transit Authority*, 262 F.3d 412 (2nd Circuit 2001) (not a prisoner); *Graham v. Lewinski*, 848 F.2d 342 (2nd Circuit 1988) (prisoner); *Roseboro v. Garrison*, 528 F.2d 309 (4th Circuit 1975) (not a prisoner); *Davis v. Zahradnick*, 600 F.2d 458 (4th Circuit 1979) (prisoner); *Barker v. Norman*, 651 F.2d 1107 (5th Circuit 1981) (not a prisoner); *Lewis v. Faulkner*, 689 F.2d 100 (7th Circuit 1982) (prisoner); *Timms v. Frank*, 953 F.2d 281 (7th Circuit 1992), *cert. denied*, 504 U.S. 957 (1992) (not a prisoner); *Breck v. Ulmer*, 745 P.2d 66 (Alaska 1987), *cert. denied*, 485 U.S. 1023 (1988) (not a prisoner). However, not all jurisdictions recognize the duty in cases involving non-prisoners. See *Brock v. Hendershott*, 840 F.2d 339 (6th Circuit 1988); *Beck v. Skon*, 253 F.3d 330 (8th Circuit 2001); *Jacobsen v. Filler*, 790 F.2d 1362 (9th Circuit 1986); *Waushara County v. Graf*, 480 N.W.2d 16 (Wisconsin 1992).

152. See, e.g., *Ruotolo v. Internal Revenue Service*, 28 F.3d 6 (2nd Circuit 1994); *Hudson v. Hardy*, 412 F.2d 1091 (D.C. Circuit 1968). See also *Ford v. Hubbard*, 305 F.3d 875 (9th Circuit 2002) (district court was obligated to inform pro se prisoner of his options with respect to his mixed habeas petitions, in other words, to advise him that it would have the power to consider his stay motions only if he opted to proceed with his exhausted claims and dismiss the unexhausted claims).

153. *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Circuit 1982).

154. *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987), *cert. denied*, 485 U.S. 1023 (1988); *Irby v. New York City Transit Authority*, 262 F.3d 412, 414 (2nd Circuit 2001); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Circuit 1975); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Circuit 1982), *cert. denied*, 504 U.S. 957 (1992).

will be taken as true.¹⁵⁵ The notice also informs the litigant of the right to file opposing affidavits or other responsive material to defeat a motion for summary judgment¹⁵⁶ or to file an amended complaint.¹⁵⁷ The notice includes the text of the rule¹⁵⁸ and a short and plain statement in ordinary English,¹⁵⁹ sufficiently clear and understandable to fairly apprise a self-represented litigant of what is required.¹⁶⁰ The notice rule, however, does not relieve a self-represented litigant of “the burden of establishing a genuine issue of material fact.”¹⁶¹

The United States Court of Appeals for the 5th Circuit has taken this requirement one step further and held that a judge “has ample discretion” to give a self-represented litigant a meaningful opportunity to remedy obvious defects in summary judgment materials.¹⁶² In *Barker v. Norman*, the 5th Circuit held that a trial court abused its discretion by failing to afford a self-represented plaintiff an opportunity to properly respond to a motion for summary judgment where the response he did file contained specific, non-conclusory, hearsay allegations that would have precluded summary judgment if he had filed a properly verified affidavit by someone with first-hand knowledge. The court noted that “such an opportunity could well be afforded through the court’s comments in the context of a hearing in which the court receives oral argument on a summary judgment motion.”¹⁶³ Similarly, in *Gordon v. Watson*, the court held that a trial judge should have given a self-represented pre-trial detainee an opportunity to file a sworn statement before ruling on a motion for summary judgment where his “answer to defendant’s motion for summary judgment” would have raised a genuine issue as to the material fact if it had been sworn.¹⁶⁴

In a logical extension of the majority rule that a self-represented litigant should be instructed how to respond to a motion for summary judgment, the Alaska Supreme Court has held that a trial judge should instruct a self-represented litigant in the proper procedures for any action he or she is obviously attempting to accomplish in other contexts as well.¹⁶⁵ The court has stated, for example, that a trial court should have instructed a self-represented mother on the proper procedures for intervention when a state agency moved for a decrease in the father’s child support obligation. The mother, who had a right to intervene, had sent a let-

155. *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Circuit 1982).

156. *Madyun v. Thompson*, 657 F.2d 868, 877 (7th Circuit 1981); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Circuit 1975).

157. *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987), *cert. denied*, 485 U.S. 1023 (1988).

158. *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Circuit 1982).

159. *Id.*

160. *Hudson v. Hardy*, 412 F.2d 1091, 1095 (D.C. Circuit 1968).

161. *Brown v. Crawford*, 906 F.2d 667, 670 (11th Circuit 1990), *cert. denied*, 500 U.S. 933 (1991).

162. *Barker v. Norman*, 651 F.2d 1107, 1129 (5th Circuit 1981).

163. *Id.*

164. 622 F.2d 120, 123 (5th Circuit 1980). The court noted that “although pro se litigants are not held to the same standards of compliance with formal or technical pleading rules applied to attorneys, we have never allowed such litigants to oppose summary judgments by the use of unsworn materials.” Interestingly, the represented moving party had also filed papers that the court of appeals found inadequate.

165. *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987), *cert. denied*, 485 U.S. 1023 (1988).

ter to the trial judge specifically asking whether she had to “make this request by a formal pleading.”¹⁶⁶

Similarly, in *Genaro v. Municipality of Anchorage*,¹⁶⁷ the court applied the rule in a case in which a self-represented plaintiff clearly wanted to withdraw admissions she was deemed to have made when she had failed to respond to discovery requests. The court noted that numerous statements by the plaintiff made it apparent that she was attempting to contest the admissions. The court noted that the plaintiff “never made an express request for help from the court on how to undo her deemed admissions or how to rescue her case.”¹⁶⁸ However, the court concluded:

While Genaro did not expressly move to withdraw her admissions and did not mention [the rule allowing for motions to withdraw or amend], we have acknowledged that the rules of court “may be models of clarity to one schooled in the law, [but] a pro se litigant might not find them so.” Although we recognize that it is often difficult for a trial court to find the correct balance between the need to remain neutral and impartial and the need to inform pro se litigants of the proper procedures for their attempted actions, we conclude that in this instance it was an abuse of discretion not to inform Genaro of “the proper procedure for the action . . . she [was] obviously attempting to accomplish,” namely, using a . . . motion to preclude summary judgment. Because this would not require “open-ended participation by the court [that] would be difficult to contain,” informing Genaro of “the technical defects in [her] pro se pleadings [would not] compromise the superior court’s impartiality.”¹⁶⁹

In *Gilbert v. Nina Plaza Condo Association*, the court held that the trial court abused its discretion in dismissing a self-represented litigant’s case for failing to comply with discovery “without explaining basic steps she could take to comply with the pretrial order . . . and without then allowing her a reasonable opportunity to take those steps.”¹⁷⁰ Both parties failed to comply with discovery, and the self-represented litigant made several efforts to notify the court that she was having problems and needed help and additional time to prepare. However, the trial judge did not attempt to explain the available procedures until he dismissed the case, stating only then “if you didn’t get discovery on a certain date, you should have filed a motion to compel.”¹⁷¹ The court has also explained that a trial judge is

166. *Keating v. Traynor*, 833 P.2d 695 (Alaska 1992).

167. 76 P.3d 844 (Alaska 2003).

168. *Id.* at 846.

169. *Id.* at 846-47 (citations omitted).

170. 64 P.3d 126, 129 (Alaska 2003).

171. *Id.*

obligated to give self-represented litigants guidance to ensure that they understand how to correct technical or procedural flaws that prevent them from meeting formal requirements that apply to actions they attempt to take in the ordinary course of their cases.¹⁷²

However:

Judicial efforts to enable unrepresented litigants to present their cases should be limited to assistance to the party in accomplishing the party's own strategy, not in suggesting a different or better strategy. So long as the judge is merely facilitating the unrepresented litigant's presentation of his or her own case — as the litigant has conceived it — the judge can be seen to be giving the party “legal information” about how to do in court what the party seeks to accomplish. The judge would lose his or her impartiality and “become the advocate” for the unrepresented litigant if the judge gives “legal advice” such as tactical or strategic recommendations for how the case should be presented — what witnesses to call, what arguments to make, what additional evidence to seek.¹⁷³

The Proposed Best Practices contains the following suggestions regarding instructions to self-represented litigants:

22. Instruct a self-represented litigant how to accomplish a procedural action he or she is obviously attempting or direct them to resources that will provide instructions.
 - Do not tell a self-represented litigant what tactic to use, but explain how to accomplish the procedural move he or she has chosen.
23. If a motion for summary judgment is filed, advise a self-represented litigant that he or she has the right to file counter-affidavits or other responsive material and that failure to respond might result in the entry of judgment against the litigant.

ASKING QUESTIONS

Judges indisputably have the discretion to question witnesses in all hearings or trials, and hundreds of cases hold that such questioning does not indicate partiality, even in jury trials in criminal cases where the defendant claims the ques-

172. *Sandidge v. Alaska Professional Teaching Practices Commission* (Alaska Supreme Court October 6, 2004).

173. Albrecht, Greacen, Hough, Zorza, “Judicial Techniques for Cases Involving Self-Represented Litigants,” 41 *Judges' Journal* 16, 44 (ABA winter 2003).

tioning assisted the prosecution. That discretion is inherent in the role of the judge.

He sits to see that justice is done in the cases heard before him; and it is his duty to see that a case on trial is presented in such way as to be understood by the jury, as well as by himself. He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other. . . . He has no interest except to see that justice is done, and he has no more important duty than to see that the facts are properly developed and that their bearing upon the question at issue are clearly understood by the jury.¹⁷⁴

Thus, a trial judge “should not hesitate to ask questions for purpose of developing the facts.”¹⁷⁵

Moreover, “the trial judge has an obligation, on his own initiative, at proper times and in a dignified, and impartial manner, to inject certain matters into the trial which he deems important in the search for truth.”¹⁷⁶

In addition to the important right to have access to the courts, it is equally important that the court be a fair and impartial one, committed to the purpose of seeking truth and doing justice, without bias or prejudice, fear or favor. . . . The judge does have a function beyond sitting as a comparatively silent monitor of the proceedings. In order to discharge his responsibility of carrying out the above-stated objective, it is within his prerogative to ask whatever questions of witnesses as in his judgment is necessary or desirable to clarify, explain or add to the evidence as it relates to the disputed issues.¹⁷⁷

Because a judge may ask questions in jury trials in criminal cases without raising reasonable questions about impartiality, logically, a judge also has the discretion in cases involving self-represented litigants to ask questions to clarify testimony, develop facts, save time, or prevent a miscarriage of justice, particularly when the judge is the trier-of-fact. For example, in *Paulding-Putnam Co-op., Inc. v. Kuhlman*, the Ohio Appellate Court rejected a utility company’s argument that the trial judge’s impartiality was “reasonably questioned by the extent and manner in which he interrogated” the self-represented plaintiff and his witness.

174. *Simon v. United States*, 123 F.2d 80, 83 (4th Circuit), *cert. denied*, 314 U.S. 694 (1941).

175. *Id.*

176. *United States v. Pinkey*, 548 F.2d 305, 308 (10th Circuit 1977).

177. *State v. Mellen*, 583 P.2d 46, 48 (Utah 1978).

During a trial, “[t]he court may interrogate witnesses, in an impartial manner, whether called by itself or by a party.” . . . A review of the trial transcript reveals that the trial judge’s interrogation of the witnesses in the case was not improper and, thus, not an abuse of discretion. . . . The trial judge merely assisted the parties through the trial with explanations of how a trial was procedurally conducted. Questions asked by the judge to the witnesses were merely to assist the judge, as the trier of fact, in making a correct and impartial decision.¹⁷⁸

Similarly, the Appellate Division of the New York Supreme Court rejected a *pro se* defendant’s contention in a civil case that the trial judge prejudiced his direct case by interruptions throughout the trial. The court noted that the “purposes of these interjections included identifying or admitting evidence, clarifying issues for . . . a *pro se* litigant, and instructing the jury. Such interjections were not only beneficial to defendants, but were a legitimate exercise of the court’s discretionary power to control the case.”¹⁷⁹

A judge’s clarifying questions do not unfairly disadvantage the represented party by altering the evidence but simply eliminate the unfair advantage a represented party might gain if a self-represented party is unable to present the facts in a way the judge or jury can comprehend. Moreover, the answer to a judge’s questions will not inevitably assist the self-represented litigant, and a judge is also free to ask questions that clarify the represented litigant’s case if counsel is not providing adequate representation. Commentators recommend that “judges make clear to the parties at the beginning of the hearing that they will ask questions — and explain why (to make sure they have the information they need to make a decision)” to reduce the chances that questions will be raised about their impartiality.¹⁸⁰

Thus, in a matter involving a self-represented litigant, a judge may ask questions that clarify and develop the issues to be decided,¹⁸¹ identify or admit evidence and clarify issues for the self-represented litigant,¹⁸² clarify the litigant’s own questions and witnesses’ responses to them,¹⁸³ and elicit material facts.¹⁸⁴

The discretion to ask questions is not unlimited, but it is impossible, of course, to specify how many questions a judge may ask before the questions become an abuse of discretion; the number that is appropriate in a particular case will depend on how many it takes to clarify the issue. A judge does need to take care that his or her language, tone, and manner remain neutral during questioning so that the judge displays no attitude towards the merits of the case or the credibility of the wit-

178. 690 N.E.2d 52, 56 (Ohio 3rd District Appellate Court 1997) (citations omitted).

179. *Thaler & Thaler v. Rourke*, 629 N.Y.S.2d 855, 857 (New York Supreme Court, Appellate Division 1995).

180. Albrecht, Greacen, Hough, Zorza, “Judicial Techniques for Cases Involving Self-Represented Litigants,” 41 *Judges’ Journal* 16, 46 (ABA winter 2003).

181. *Lapeyrouse v. Barbaree*, 836 So. 2d 417, 423 (Louisiana 2002).

182. *Thaler & Thaler v. Rourke*, 629 N.Y.S.2d 855, 857 (New York Supreme Court, Appellate Division 1995).

183. *State v. Hutch*, 861 P.2d 11, 15 (Hawaii 1993).

184. *Id.*

ness. Because questioning is within a judge's discretion, questioning is only likely to be considered inappropriate if it is done in the manner of an advocate, casts aspersions or ridicule upon a witness, or is on matters collateral or entirely relevant to the case.¹⁸⁵

A judge may also use questions to fill a gap in the evidence that is likely to result in a decision other than on the merits.¹⁸⁶ A judge in a city court in New York, for example, concluded that case law and common sense require a judge to ask unrepresented litigants whatever questions about damages are necessary to permit a recovery if the litigants established a cause of action at trial in a small claims case.¹⁸⁷ Emphasizing that many litigants, despite instructions, do not submit evidence of damages, the court stated:

Yet if we grant judgment dismissing the complaint or as defense counsel suggests, to the plaintiff in the amount of \$1.00, can anyone rationally suggest in this day and age that we have done "substantial justice between the parties" when it is clear that the plaintiff has obviously sustained damages well in excess of \$1.00? To do so at this point would not be "substantial justice"—it would be a travesty on justice.

* * *

Yet does even one out of a hundred unrepresented plaintiffs know enough to articulate the magic words "the value of my property at the time it was damaged was . . ."? Is Small Claims to become something akin to the old Groucho Marx Show wherein the contestant must say the "magic words", in order to receive their reward? Shall we, as was done in that show, provide a duck to descend from the ceiling to award the unrepresented litigant his judgment if and only if he mouths these magic words? Assuredly the duck would not often be needed for, as with the old show, very few contestants will know enough to say the "magic words."

To do what is reasonably necessary to prevent obvious injustice, the judge concluded, he "must direct the claimants' attention to those precise questions which our case law, with which the unrepresented litigant could not possibly be expected to be familiar, requires be answered in order for the claimant to recover his judgment."

185. See, e.g., *McCartney v. Commission on Judicial Qualifications*, 526 P.2d 268 (California 1974).

186. See *Lombardi v. Citizens National Trust & Savings Bank*, 289 P.2d 823 (California Second District Court of Appeal 1955) (judge should call to the attention of a self-represented litigant omissions in the evidence or defects in the pleadings that are likely to result in a decision other than on the merits); *Gonzalez v. Long*, 889 F. Supp. 639 (E.D. New York 1995) (judge should recommend that self-represented litigant familiarize himself or herself with cases that set forth the evidentiary burden that a plaintiff must sustain to establish a *prima facie* case).

187. *Webster v. Farmer*, 514 N.Y.S.2d 165, 168 (City Court of Oswego, New York 1987).

The Proposed Best Practices contains the following suggestions regarding asking questions in cases involving self-represented litigants:

34. Call breaks where necessary if a litigant is becoming confused or tempers on either side are becoming frayed (or your patience is running low).
35. Question any witness for clarification when the facts are confused, undeveloped, or misleading.
 - Explain at the beginning of a hearing that you will ask questions if necessary to make sure you understand the testimony and have the information you need to make a decision.
 - Ask the same type of questions of witnesses called by a represented party if warranted.
 - Take care that your language and tone when asking questions does not indicate your attitude towards the merits or the credibility of the witness.

EVIDENCE

Strict enforcement of the rules of evidence in cases involving self-represented litigants can lead to unjust results as illustrated by the following real life examples.¹⁸⁸

- A pro se plaintiff in a protection from harassment case offers the defendant's recent jury-trial conviction for assaulting her as proof that he harassed her. Proof of the conviction is inadmissible because in Maine criminal assault is a misdemeanor and, therefore, not within the hearsay exception that permits proof of conviction for a crime "punishable by death or imprisonment of one year or more." The defendant's lawyer successfully objects. The plaintiff failed to bring witnesses to support her complaint because she assumed that the conviction would suffice. Her case is reduced to a swearing contest between herself and the defendant.
- In a protection from abuse case, the pro se plaintiff has prepared a statement about the incident to read because she knows that she is too scared of the defendant to testify in front of him from memory alone. The defendant's attorney successfully objects to her reading the statement because it does not qualify under the recorded recollection exception to the hearsay rule. The plaintiff is too upset to testify without the statement, and the case is dismissed for her failure of proof.

188. Sheldon, Murray, "Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials," 86 *Judicature* 227, 229-30 (AJS March-April 2003). The examples were drawn from one of the author's "actual experiences in Maine state courts, in each of which a pro se litigant opposes a party represented by counsel." Mr. Sheldon is a former judge of the Maine District Court.

- In a protection from abuse hearing, the pro se plaintiff seeks to introduce hospital records showing her injuries, treatment, and expenses. She fails to lay a foundation for the records' admissibility as required by the business records exception to the hearsay rule. Following the defendant's lawyer's objection, the judge rules the records inadmissible.

Used against pro se litigants, the rules of evidence do not act as tools for discovering the truth but as "weapons that the lawyer can use to gain an advantage that has nothing to do with the merits of the case."¹⁸⁹

Moreover, in most cases involving self-represented litigants, many evidentiary rules may be superfluous. The rules of evidence are primarily designed "to prevent lay jurors from getting information that might prejudice them against a party, or distract them from the core issues of the case, or confuse them, or otherwise cause them to settle on a verdict for the wrong reasons."¹⁹⁰ Admission of inadmissible evidence is almost always considered harmless error even in jury cases. Therefore, at least in cases in which the judge is the trier-of-fact, there seems little reason to enforce the rules of evidence as long as the evidence being presented is reliable and not subject to privilege. Of course, to be fair, the same relaxation of the rules should also apply to any party represented by counsel in the case.

It has been recommended that judges "create an informal atmosphere for the acceptance of evidence and testimony," relaxing the formal rules of procedure and evidence in cases involving self-represented litigants.¹⁹¹

[T]he judge can easily accomplish this by using informal language. By stating, "I will give each of you a chance to tell me what you think I need to know to decide each of the issues in this case," the judge can create an informal environment for accepting evidence. Any party can object at this point and insist on following the rules of evidence, but this is unlikely. In the absence of objection, the parties can waive the rules of evidence regarding following the traditional question and answer format, establishing a foundation for introducing documents and exhibits, qualifying an expert, and the like.¹⁹²

Courts have at least tacitly approved such procedures. The New Hampshire Supreme Court commended the way a trial judge conducted a non-jury trial in a

189. *Id.* at 228.

190. *Id.* at 227.

191. Albrecht, Greacen, Hough, Zorza, "Judicial Techniques for Cases Involving Self-Represented Litigants," 41 *Judges' Journal* 16, 46 (ABA winter 2003).

192. *Id.* See also Goldschmidt, "The Pro Se Litigant's Struggle for Access to Justice," 40 *Family Court Review* 36 (January 2002).

quiet title action, rejecting the self-represented plaintiff's charge of bias. The court noted that the trial judge had "relaxed the rules of evidence and made a special effort to explain to the plaintiff proper courtroom procedures in order to facilitate the plaintiff's presentation of his case."¹⁹³

In *Wilkerson v. Ekelem*, a dispute between a property owner and a contractor, the Tennessee Court of Appeals rejected the property owner's argument that the trial court's judgment resulted from "some sort of bias against pro se litigants." The court noted that the trial court had been "exceedingly solicitous in its treatment" of the pro se plaintiff, overruling sound objections by the contractor's counsel, allowing the pro se plaintiff to repeatedly ask the same question, and reining him in "only when he strayed far, far beyond testimony and conduct that would be tolerated in a case where a party was represented by counsel."¹⁹⁴

Indeed, relaxed rules have been approved even in jury cases. The Illinois Appellate Court upheld a verdict in favor of the self-represented surgeon-defendant in a malpractice action despite the represented plaintiff's argument that she had been denied a fair trial by the judge's attempt to assist the defendant in presenting his case. The judge had "guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters" and "carefully explain[ed] to the defendant why certain objections were being sustained." Despite this assistance, the appellate court held that there was no evidence that the judge had conducted the defendant's case for him or failed to remain impartial.¹⁹⁵

There is one judicial discipline case in which a judge was criticized for using an alternative procedure in a case involving a self-represented litigant. In *Inquiry Concerning Broadman*, the California Commission on Judicial Performance publicly censured a judge for denying due process in a civil trial in which the plaintiff was not represented.¹⁹⁶ After calling the case for trial, the judge had asked the parties to tell him what the case was about. After the plaintiff spoke, the defendant's attorney gave a version of his opening statement, and the defendant made a statement. The judge then alternated asking the parties questions. No one was placed under oath. After questioning the plaintiff and the defendant, the judge asked if either of them had anything to add. He then told them that he was taking the case under submission and asked the defendant's attorney to prepare a statement of decision and judgment. The judge had not stated that he was going to follow an alternative procedure nor that the parties could have a traditional trial if they wanted one.

Judge Broadman's conduct went further than any accommodations advocated

193. *Austin v. Ellis*, 408 A.2d 784, 785 (New Hampshire 1979).

194. *Wilkerson v. Ekelem*, 2004 WL 578600 (Tennessee Court of Appeals March 24, 2004).

195. *Oko v. Rogers*, 466 N.E.2d 658, 660-61 (Illinois 3rd District Appellate Court 1984).

196. *Inquiry Concerning Broadman*, Decision & Order Imposing Public Admonishment (California Commission on Judicial Performance February 26, 1999) (cjp.ca.gov).

for cases involving self-represented litigants. No one recommends that, to accommodate pro se litigants, judges should proceed, like Judge Broadman did, without explanations to or the permission of the parties or the protection of putting parties under oath. Moreover, Judge Broadman took the steps he did, not to facilitate presentation of evidence by a self-represented litigant, but, according to the Commission, because he was “focused on his vision of efficiency with little regard for the values that underlie the usual procedures for presenting evidence and cross-examining witnesses.”

Although a judge may facilitate the presentation of evidence by a self-represented litigant and by questioning point out gaps in the evidence that should be filled, a judge should not engage in independent investigations to assist a self-represented litigant gather the evidence necessary to present the case.¹⁹⁷ Such an investigation violates the prohibition on ex parte communications, which is one of the core provisions of the code of judicial conduct. Investigating facts, although it is something lawyers do, is not a uniquely lawyerly skill that is taught exclusively in law school. Particularly when a judge explains matters such as the elements that need to be proven and what types of evidence are acceptable, diligent pro se litigants should be just as capable of assembling the facts to prove their damages or other elements of their case as they are of making a claim to an insurance company or applying for a job or mortgage, the types of activities in which most individuals routinely engage without assistance from lawyers. Moreover, expecting a judge to conduct an independent investigation for only one side of a case invites open-ended involvement in the process that looks more like advocacy, imposes an unfair burden on the judge, and creates unreasonable expectations on the part of self-represented litigants. It then becomes the judge’s fault if the litigant is unable to produce the evidence necessary to win the case. Once a judge is told he or she can verify facts by telephone or make simple, factual inquiries, where does a judge faced with hundreds of cases stop?

The Proposed Best Practices contains the following suggestions on relaxing rules of evidence and procedure in cases involving self-represented litigants:

36. Follow the rules of evidence that go to reliability but use discretion and overrule objections on technical matters such as establishing a foundation for introducing documents and exhibits, qualifying an expert, and the form of questions or testimony.
 - If you relax a rule for a self-represented party, relax it for a represented party as well.

197. *But see* Goldschmidt, “The Pro Se Litigant’s Struggle for Access to Justice,” 40 *Family Court Review* 36, 51 (January 2002).

- Require counsel to explain objections in detail.
 - If counsel objects, ask if he or she is arguing that the evidence is unreliable.
 - Explain rulings on evidence.
37. If necessary to prevent obvious injustice, allow a brief recess or adjourn for the day (or longer) to allow a self-represented litigant (or even a represented litigant) to obtain additional evidence or witnesses.

SETTLEMENT

A judge may set aside a settlement in order to prevent injustice upon a showing of good cause such as fraud. The better practice, of course, would be to ensure that the settlement is not unjust before it is entered. When a settlement results in an order by the court, a judge should ensure that the settlement is not unduly one-sided before signing it. No reasonable questions can be raised about a judge's impartiality when the judge tries to ensure that any court order is not memorializing and implementing an injustice. Analogies are to the obligations to ensure that plea bargains are knowingly entered into in criminal cases and to review the terms of settlements in class actions.

"A party's lack of representation at the time of entry into the stipulation is a significant factor to be considered in determining whether good cause exists to vacate the stipulation."¹⁹⁸ Thus, when presented with a settlement order for signature, a judge should engage in an allocution designed to elicit whether the settlement is a fair resolution. In housing court, for example, before signing a settlement, a judge should ask questions to determine whether an unrepresented tenant had a defense to a landlord's rent claims, made an informed or knowing choice to proceed without counsel, had a basic understanding about legal rights and defenses, understands the legal consequences of the enforcement remedies provided in the stipulation, and is aware that stipulations are supposed to be the result of negotiations and that they are not required to sign the stipulations as drafted by the landlords' attorneys.¹⁹⁹

Settlements are often beneficial to all parties in a case, both represented and pro se, and a judge may encourage parties to discuss settlement or to resort to mediation programs. Self-represented litigants may not understand the benefits of settlement and mediation, and a judge may explain to pro se plaintiffs that agreeing to accept less than they want may facilitate their collection of something and to pro se defendants that agreeing to pay something may allow them to avoid onerous col-

198. *144 Woodruff Corp. v. LaCrete*, 585 N.Y.S.2d 956, 958 (Civil Court, City of Kings County, New York 1992).

199. *Id.*

lection procedures. However, as in all cases, in cases involving pro se litigants, a judge should not make “parties feel coerced into surrendering the right to have their controversy resolved by the courts.”²⁰⁰

The Proposed Best Practices contains the following suggestions regarding settlements in cases involving self-represented litigants:

25. At a pre-trial or status conference, bring up the possibility of settling the matter or referring it to mediation.
 - Encourage, but do not try to coerce, settlement or mediation.
26. If the parties present you with an agreed order settling a case, engage in allocution to determine whether the self-represented litigant understands the agreement and entered into it voluntarily.
 - Explain that if an agreement is approved, it becomes an order of the court with which both parties will be required to comply.
 - Determine that any waiver of substantive rights is knowing and voluntary.

DILIGENT SELF-REPRESENTED LITIGANT ACTING IN GOOD FAITH

A judge’s ability to make reasonable accommodations for pro se litigants does not oblige a judge to overlook a self-represented litigant’s violation of a clear order, to repeatedly excuse a self-represented litigant’s failure to comply with deadlines, or to allow a self-represented litigant to use the process to harass the other side.²⁰¹

For example, in *Newsome v. Farer*,²⁰² the trial judge had dismissed with prejudice a records inspection suit against a university after the self-represented plaintiff failed three times to attend the production of documents that he had requested and the trial judge had ordered. Although noting that dismissal with prejudice should be used sparingly, the New Mexico Supreme Court concluded that the plaintiff’s “rigidity” and “obdurate position” prevented progress in the case and justified the drastic sanction.²⁰³ The court found that the judge’s order was clear and specific and, therefore, the plaintiff’s failure to attend was willful rather than negligent or the result of misunderstanding. The court also found that the plaintiff did not notify the court or the university of his intention not to attend and offered no satisfactory explanation for his conduct despite several opportunities and a warning of the possible consequences of failing to do so. Noting the plaintiff’s “insistence that only he would dictate the progress of this action,” the court stated that a “litigant is

200. Commentary to Canon 3B(7), ABA Model Code of Judicial Conduct.

201. In *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975), the United States Supreme Court explained that “the right of self-representation is not a license to abuse the dignity of the courtroom.”

202. 708 P.2d 327 (New Mexico 1985).

203. *Id.* at 333.

not free to disregard an order of the court simply because he disagrees with it.”²⁰⁴ The court rejected the plaintiff’s “disingenuous attempt to invoke special privilege because of his *pro se* status.”

Even though one may not be legally trained, common sense dictates that when a party petitions the court to enforce a right to inspect public records, and the court responds by ordering that requested documents be produced, the petitioner is not then free to disregard the arrangements made to comply with the relief ordered, simply because the court did not affirmatively direct the petitioner to attend. Certainly it does not require legal training or even any great degree of intelligence to understand that documents are not ordered to be produced in a vacuum. Production necessarily implies inspection. [The plaintiff’s] *pro se* status does not require us or the trial court to assume he must be led by the hand through every step of the proceeding he initiated.²⁰⁵

Similarly, although acknowledging that the trial judge had a duty to recognize the defendants’ self-represented status and treat them accordingly, the United States Court of Appeals for the 7th Circuit, in *Downs v. Westphal*, held that a default judgment foreclosing the defendants’ interest in some land was warranted as a sanction for violations of discovery rules and court orders.²⁰⁶ Noting that the case was the result of a “long, drawn-out family feud,” the court stated that “being a *pro se* litigant does not give a party unbridled license to disregard clearly communicated court orders . . . [or] give the *pro se* litigant the discretion to choose which of the court’s rules and orders it will follow, and which it will wilfully disregard.”²⁰⁷

The [defendants] did not disobey court orders because of innocent misunderstanding or lack of familiarity with the law. Their communications with the court make clear that they understood those orders and chose to defy them. The district court more than fulfilled its duty to [defendants] as *pro se* litigants. The court warned them that more severe sanctions would be forthcoming, even though the “district court is not required to fire a warning shot” before it defaults an offending party. The court explained that its previous efforts to force the [defendants] to comply had failed, and that there was “no reason to believe that further orders would be obeyed.” The [defendants]

204. *Id.* at 331.

205. *Id.* at 333. See also *Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759, 763 (2nd Circuit 1990) (dismissal for failure to attend deposition was not abuse of discretion where self-represented litigant received adequate warning of consequences of non-compliance).

206. 78 F.3d 1252, 1257 (7th Circuit), *opinion amended on denial of rehearing*, 87 F.3d 202 (1996).

207. *Id.*

were given numerous opportunities to correct their sanctionable conduct and comply with discovery rules and court orders.²⁰⁸

The court concluded that the trial judge had “demonstrated remarkable patience in dealing with this troupe of unruly litigants [who] . . . worked overtime to try that patience, and they went too far.”²⁰⁹

Stating that “*pro se* litigants should not be precluded from resorting to the courts merely for want of sophistication,” the United States Court of Appeals for the 6th Circuit nevertheless upheld a trial judge’s dismissal of a prisoner’s civil rights suit for want of prosecution.²¹⁰ The district court had twice granted motions for extensions of the discovery and motion cut-offs, but denied a motion for a third extension. In addition, the plaintiff did not submit a required pretrial statement although the defendant did.

On appeal, the 6th Circuit found “no persuasive reason has been posited why [the plaintiff] should be accorded special consideration under the circumstances of this case.”²¹¹

His action was not dismissed as the result of inartful pleading or any lack of legal training, but rather because he failed to adhere to readily comprehended court deadlines of which he was well-aware. That he comprehended their significance is evidenced by his having sought their extension. The district court was generous in granting extensions which [the plaintiff] failed to utilize. Furthermore, there has been no demonstration that his incarceration was responsible for any inability to proceed in a timely fashion.²¹²

In *Coffland v. Coffland*,²¹³ the Alaska Supreme Court affirmed a trial judge’s order sanctioning the husband in a divorce action for his failure to comply with a discovery order. (The sanction precluded him from proving the existence of several promissory notes that he claimed were marital debts.) The husband contended that his failure to comply could be explained by his *pro se* status and the demands of running a Subway franchise and teaching survival classes. The supreme court acknowledged that a trial judge has an obligation to “inform a *pro se* litigant of the proper procedure for the action he or she is obviously attempting to accomplish.” However, the court noted that the husband had made no effort to cooperate with the trial judge or to request assistance in complying with its orders and that the pretrial order put him on notice that a failure to cooperate in discovery could result in sanctions.²¹⁴

208. *Id.*

209. *Id.*

210. *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Circuit 1991).

211. *Id.*

212. *Id.*

213. 4 P.3d 317 (Alaska 2000).

214. *Id.* at 321.

The court concluded that “a pro se litigant must make some attempt to comply with the court’s procedures before receiving the benefit of the court’s leniency.”²¹⁵

In other cases as well, the Alaska Supreme Court has announced that absent a “good faith attempt to comply with judicial procedures and to acquire general familiarity with and attempt to comply with the rules of procedure,” a self-represented litigant “may be denied the leniency otherwise afforded pro se litigants,” at least when the pro se litigant initiated the action.²¹⁶

THE MINIMUM

At a minimum, judges are required to give self-represented litigants fair and equal treatment²¹⁷ and are prohibited from placing self-represented litigants at a disadvantage other than whatever disadvantage arises from proceeding without the assistance of counsel.²¹⁸ Unfortunately, there are many judicial discipline cases that indicate some judges have used the absence of an attorney to take advantage of self-represented litigants in blatantly unfair proceedings.

For example, in *In the Matter of Walsh*,²¹⁹ the judge established two special procedures for unrepresented litigants in criminal cases. In one procedure, the judge required defendants who requested jury trials to appear and answer a “jury trial roll call” once a week, even when no jury trials were scheduled, until their case was disposed of or they got an attorney. Some defendants had to travel long distances and be absent from their jobs to attend the weekly roll calls. At least three defendants who did not appear were tried and convicted in their absence.

The judge maintained that the purpose of the roll calls was to “keep track” of defendants, noting that, while awaiting roll call, many defendants determined that the judge was fair and withdrew their request for a jury trial. During the disciplinary proceedings, the judge recognized that the procedure deterred persons from exercising their right to a jury trial and that it was inappropriate to treat defendants without attorneys different from those with attorneys.²²⁰

In the second procedure, prior to a jury trial, unrepresented defendants were served with subpoenas requiring that they attend pre-trial conferences to enter into plea discussions with the prosecutor. The court noted that the judge came to recognize that this arrangement suggested a bias toward the state.²²¹

215. *Id.*

216. *Kaiser v. Sakata*, 40 P.3d 800, 803 (Alaska 2002). *See also Lawson v. Helmer*, 77 P.3d 724 (Alaska 2003) (self-represented litigant waived issue of attorney fees award where he presented no argument at all in support of his claim).

217. *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Circuit 1983).

218. *Johnson v. Aetna Casualty and Surety Co.*, 630 P.2d 514, 517 (Wyoming), *cert. denied*, 454 U.S. 1118 (1981).

219. 587 S.E.2d 356 (South Carolina 2003).

220. *Id.* at 358.

221. *Id.* at 360.

Pursuant to the judge's agreement, the California Commission on Judicial Performance publicly admonished a judge for nine incidents in which he failed to respect the rights of unrepresented individuals.²²²

1. The judge did not allow an unrepresented defendant to cross-examine the police officer in a trial on a speeding ticket, resulting in reversal of the conviction.
2. The judge insisted that a defendant charged with driving a vehicle with an expired registration sell his car.
3. When a defendant requested an extension of time to complete community service, the judge sentenced her to 44 days in the county jail without informing her that he was conducting a violation of probation hearing or otherwise advising her of her rights.
4. The judge found a juror who was late in contempt and remanded him without citing him for contempt or otherwise informing him that he was conducting a contempt hearing.
5. The judge sentenced one defendant in the absence of a plea or conviction.
6. After a defendant asked for an attorney in a misdemeanor case, the judge suggested to the defendant that "(a) you use that tax return money to get an attorney; and (b) that you go out and find a job right away, okay?"
7. At a probation revocation hearing, the judge added 30 days to an unrepresented defendant's jail sentence without advising him that he had the constitutional right to an attorney and a hearing.
8. At a probation revocation hearing, the judge reinstated and modified the terms of an unrepresented defendant's probation by imposing community service hours in lieu of a fine without advising her of her constitutional rights regarding revocation of probation.
9. During a preliminary hearing in a rape case, after the alleged victim testified that she had given the police information that was not true, the judge ordered that she be taken into custody. When the district attorney noted several times that no charges were pending against the victim, the judge stated that she had admitted a crime in court. Approximately 10 minutes later, the judge released the victim upon the condition that she not leave the courthouse. After the preliminary hearing and a lunch recess, the judge had the alleged victim brought into the courtroom and told her that he was ordering a transcript to be prepared for the district attorneys' office to review to possibly file criminal charges. The judge stated that he was going to order the alleged victim to return to court, then withdrew the order at the deputy district attorney's request. He then told the victim she was free to leave.

222. *Inquiring Concerning Henne*, Decision and Order Imposing Public Censure (California Commission on Judicial Performance October 13, 1999) (cjp.ca.gov).

The Florida Supreme Court sanctioned a judge who had required employees of a domestic abuse shelter to submit affidavits swearing that they had not furnished any assistance to pro se petitioners with domestic violence complaints, which chilled the willingness of victims and staff to come forward with legitimate claims and limited the rights of the petitioners.²²³

Abuses of authority in civil cases involving self-represented litigants have also been condemned by judicial discipline authorities. For example, the New York State Commission on Judicial Conduct found that a non-lawyer judge's handling of a small claims case filed by an unrepresented plaintiff "was fraught with errors as to basic procedures and conveyed the appearance that he prejudged the case based upon inappropriate, ex parte contacts."²²⁴ Among other errors, on the scheduled trial date, the judge failed to administer an oath to the self-represented plaintiff before hearing his testimony about the substance of his claim. When the plaintiff objected that no one was present on behalf of the defendant, the judge read him a memorandum from the village attorney without providing a copy. At the conclusion of the proceeding, the judge told the plaintiff that he could submit additional information in support of his claim before March 19, 1999. The plaintiff agreed to furnish the additional material by March 15, but on March 14, the judge sent his decision to the village attorney dismissing the claim, and on March 15, sent a similar decision to the plaintiff.

The New York Commission also concluded that a second judge (himself a non-lawyer) failed to comply with the law by signing a judgment on a landlord's petition for eviction and back rent without holding a hearing on the contested

223. *Inquiry Concerning Shea*, 759 So. 2d 631, 632-33 (Florida), *cert. denied*, 531 U.S. 826 (2000) (removal for this and other misconduct). See also *In the Matter of Meacham*, Determination (New York State Commission on Judicial Conduct October 28, 1993) (www.scjc.state.ny.us) (censure for, among other misconduct, accepting a guilty plea immediately after arraignment from a 16-year-old unrepresented defendant whose mental stability the judge questioned, refusing to set bail as required by law, and denying repeated requests to allow the defendant to withdraw the plea and go to trial, even though the prosecutor consented); *Inquiry Concerning Graham*, 620 So. 2d 1273 (Florida 1993), *cert. denied*, 510 U.S. 1163 (1994) (removal for, among other misconduct, ordering an unrepresented defendant charged with misdemeanor possession of marijuana to assist the county sheriff in "two buys and two sells" of drugs as a condition of his sentence and ordering an unrepresented defendant charged with misdemeanor possession of marijuana to "assist the State Attorney's Office in catching a drug dealer" as a condition of his sentence); *In the Matter of Winegard*, Determination (New York State Commission on Judicial Conduct September 26, 1991) (www.scjc.state.ny.us) (removal for, among other misconduct, coercing guilty pleas in two cases involving an unrepresented, 19-year-old defendant); *In the Matter of the Rock*, Determination (New York State Commission on Judicial Conduct June 27, 2001) (www.scjc.state.ny.us) (censure pursuant to an agreement for, among other misconduct, repeatedly violating the rights of two unrepresented 16-year old defendants); *In the Matter of Hise*, Determination (New York State Commission on Judicial Conduct May 17, 2002) (www.scjc.state.ny.us) (admonition pursuant to agreement for convicting an unrepresented defendant and imposing a jail sentence after the defendant had pleaded not guilty, without a trial, relying on the defendant's incriminating statements at arraignment, and without the defendant changing his plea to guilty or waiving his right to a trial); *In the Matter of Smith*, Determination (New York State Commission on Judicial Conduct June 16, 1994) (www.scjc.state.ny.us) (censure, for among other misconduct, violating the fundamental rights of a defendant in a criminal case).

224. *In the Matter of Gori*, Determination (New York State Commission on Judicial Conduct March 29, 2001) (www.scjc.state.ny.us). Gary Betters filed a small claims court action against the Village of Malone, seeking \$1,588.60 in back wages for his previous employment as co-director of the Malone Memorial Recreation Park. The village attorney served a motion to dismiss Betters' claim on the basis that the appropriate defendant was the Malone Recreation Commission and then telephoned the judge to ask about the status of his motion. The judge had ex parte conversations with the attorney for the village, the village treasurer, and the village budget officer.

issues or according the pro se tenants full opportunity to be heard.²²⁵ After a discussion at the bench, in which the tenants agreed to leave the premises but argued that the past due rents should be abated due to inadequate heat, the judge signed a judgment awarding the landlord possession and back rent in the full amount of the claim without according the tenants an opportunity to be heard on the issue of abatement.

The New York Commission found that another judge's handling of a case repeatedly violated a third-party defendant's rights, constituted an abuse of his judicial power, and suggested that he was biased against the unrepresented litigant.²²⁶ The judge had granted a default judgment against the third-party defendant, Ronald Loeber, a self-represented litigant, and ordered him to execute a deed to real property even though his time to answer the third-party complaint had not expired and he was not in default, he had appeared in court and expressed in writing and orally his intention to defend the action on the merits, and as the third-party defendant, he would be held liable only if the defendant were ultimately found liable on the claim, and no such finding had been made. The judge found Loeber in contempt for refusing to sign and sentenced him to six months in jail. At sentencing, Loeber objected to the terms of the corrective deed but was not able to enunciate his position to the judge's satisfaction. The judge did not explain how Loeber could purge himself of the contempt, which was required by statute. Loeber remained in the county jail for 45 days until another court acted on an application brought by his newly retained attorney.

An Ohio judge was sanctioned for implementing an improper procedure in debt collection cases in small claims court that reflected "a predisposition in favor of plaintiff-creditors."²²⁷ (The procedure was not confined to cases with self-represented defendants but presumably had a substantial effect on those without lawyers.) Under the procedure, the action to collect a small-claims judgment was taken upon the court's initiative, not upon the request of the judgment creditor, and circumvented the protections afforded by law to small claims court judgment debtors by making freedom from incarceration dependent upon payment in full of a small claims judgment. The Ohio Supreme Court stated, "a judge may not blatantly disregard procedural rules simply to accomplish what he or she may unilaterally consider to be a speedier or more efficient administration of justice."

225. *In the Matter of Williams*, Determination (New York State Commission on Judicial Conduct November 19, 2001) (www.scjc.state.ny.us).

226. *In the Matter of Teresi*, Determination (New York State Commission on Judicial Conduct February 8, 2001) (www.scjc.state.ny.us).

227. *Disciplinary Counsel v. Medley*, 819 N.E.2d 273, 280 (Ohio 2004).

CONCLUSION

Judges' allegiance to the concept of impartiality is laudatory and indeed required. Refusing to change anything in cases involving self-represented litigants is obviously the easiest way to ensure that judicial impartiality is not questioned, and judges' hesitance to deviate from the procedures is understandable.

Moreover, judges cannot eliminate the inherent advantage to a represented party of having (with luck) an articulate, knowledgeable, skillful, and diligent advocate. They are not so prescient and powerful that they can ensure the correct outcome in every case. To ask or expect them to level the playing field in cases involving self-represented litigants is not reasonable.

Judges can, however, by reasonable accommodations moderate the tilt of the playing field a little less against pro se litigants, remove hidden, lethal traps, and clearly explain the rules of the game. They can eliminate any unfair advantage a represented litigant has over a self-represented litigant and by vigilance ensure a fair chance. The caselaw indicates that many judges are already doing so without significant concerns being raised about their impartiality. Certain types of conduct toward pro se litigants are unquestionably prohibited (disrespectful demeanor, for example), some are unquestionably required (liberal construction of complaints, for example), some accommodations are unquestionably allowed (plain English explanations, for example), and other accommodations reasonably follow from these principles.

The concept of impartiality is not so inflexible and divorced from a sense of fair play that it precludes judges from taking such steps. Only reasonable questions about a judge's impartiality are relevant under the code of judicial conduct, and it cannot reasonably be said that impartiality requires a judge (indeed an entire court system) to stand by and watch helplessly while self-represented litigants flounder when simple procedural accommodations would at least enable them to be heard on the merits with evidence presented in a comprehensible fashion.

The adversary system is not ensconced in the code of judicial conduct, nor is the primary purpose of the code to protect the formalities of the adversary system. While judges may be more comfortable in the role reflected in the rare situation in which all parties are represented by competent, diligent counsel, their discomfort in a more involved role does not necessarily suggest the role reflects partiality, and the traditional role of the judge is in fact as a guiding force at a trial, not just a ceremonial presence or silent monitor presiding over rituals understandable only by the initiated.

Reasonable procedural accommodations for self-represented litigants do not unfairly disadvantage their represented opponents. Such leniency does not change the facts, the law, or the burden of proof or ensure a victory for the unrepresented. Requiring represented litigants to try cases on the merits rather than

spring technical traps cannot be considered as affording self-represented litigants an unfair advantage. At most, it gives both represented and self-represented litigants a fair opportunity to tell their stories. In fact, the reasonable accommodations suggested by caselaw and commentators may also benefit represented parties by simplifying procedures, and a judge has the discretion to extend the accommodations to represented parties if an attorney is failing to provide adequate representation.

A remedy is needed for the confusion about how much flexibility the concept of impartiality allows a judge to facilitate understandable, fair procedures in cases involving self-represented litigants. One change would be to amend the code of judicial conduct to reflect that:

A judge may make procedural accommodations to provide diligent pro se litigants the opportunity to have their cases fully heard, and such an exercise of judicial discretion does not raise a reasonable question about the judge's impartiality. Reasonable accommodations include liberally construing pleadings, explaining the basis for a ruling, refraining from using legal jargon, questioning witnesses for clarification, freely allowing amendment of pleadings, and explaining general matters such as the burden of proof and what types of evidence may and may not be presented.

In 2004, the American Judicature Society proposed that such commentary be added to the model code of judicial conduct in the code revision process being conducted by the American Bar Association,²²⁸ not to change the code, but to reflect a more nuanced understanding of the concept of impartiality that is consistent with the caselaw and principles underlying the code.²²⁹

228. www.abanet.org/judicialethics/resources/comm_rules_gray_1004_ddt.pdf. In September 2003, the ABA appointed a Joint Commission to Evaluate the Model Code of Judicial Conduct to review the ABA's model code of judicial conduct and to recommend revisions for possible adoption by the House of Delegates. The Commission has held public hearings across the country in 2004-2005 and released several drafts. The Joint Commission will file a final report for consideration by the ABA House of Delegates in February 2006. See www.abanet.org/judicialethics/home.html.

229. In addition, Richard Zorza has proposed that the following comments be added to the code of judicial conduct (www.abanet.org/judicialethics/resources/comm_rules_zorza_070804.pdf):

- Given the judge's important role in protecting the litigants' equal right to be heard when one or both parties is proceeding pro se, non-prejudicial and engaged courtroom management may be appropriate to protect this right. Such management may include questioning witnesses, modifying the traditional order of taking evidence, providing information about the law and evidentiary requirements, and making referrals to agencies able to assist the litigant in the preparation of the case. A careful explanation of the purpose of this type of management will emphasize that this judicial engagement is in support of the right to be heard.
- When a litigant is appearing pro se, affirmative, engaged, and non-prejudicial, steps taken by a judge who finds it necessary to take such steps . . . to make sure that all appropriate evidence is properly before the court, are not inconsistent with the requirements [that a judge perform duties without bias or prejudice].
- The rapid increase of pro se litigation, and the increasing awareness of the significance of the courts' role in providing access to justice have led to additional administrative requirements upon the judiciary, including particularly participation in the creation of innovations designed to facilitate the right to be heard.

Moreover, it would assist trial judges if jurisdictions would adopt best practices to provide guidance for conducting cases involving self-represented litigants. The more routine these practices become, in all cases involving self-represented litigants and indeed most cases involving individual litigants regardless whether represented, the more likely they will be accepted and the less likely they might be construed as evidence of partiality. Proposed best practices for cases involving self-represented litigants follow.

Proposed Best Practices for Cases Involving Self-Represented Litigants¹

These practices are helpful, and many are required, in all cases, not just those involving self-represented litigants.

GENERAL

1. When a litigant appears without an attorney, verify that the litigant understands that he or she is entitled to be represented by an attorney; give information on pro bono or lawyer referral resources. Explain that self-representation is difficult, you as judge cannot act as an advocate for either side, and the other party's attorney will not provide assistance or advice.
 - If an unrepresented litigant appears to be mentally disabled, take additional steps to involve counsel and other support services.
 - The difficulty of self-representation should be emphasized in cases that are particularly complex, cases where the stakes are very high, and jury cases.
 - Once it is clear a litigant does not intend to get an attorney, do not harp on pro se status or make negative comments that suggest pre-judgment or disapproval.
2. Direct the litigant to the resources available for self-represented litigants.
 - Inform a self-represented litigant that he or she has the responsibility to become familiar with and attempt to comply with the rules of procedure.

1. The ideas in these best practices are based on the accompanying paper *Reaching Out or Overreaching: Judicial Ethics and the Self-Represented Litigant*; on the "Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants" from the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges; on the November 2004 draft of "Judicial Guidelines for Hearings Involving Self-Represented Litigants" proposed by the Subcommittee on Judicial Guidelines of the Massachusetts Supreme Court Steering Committee on Self-Represented Litigants; on "Judicial Techniques for Cases Involving Self-Represented Litigants" by Rebecca Albrecht, John Greacen, Bonnie Hough, and Richard Zorza, published in the winter 2003 *Judges' Journal*; and on "Self-Represented Litigants: Learning from Ten Years of Experience in Family Courts" by John Greacen, published in the winter 2005 *Judges' Journal*.

- Repeat information regarding resources at every stage in the process.
3. Be generous in granting extensions of time to self-represented litigants (and others) to prepare for a hearing, obtain counsel, or comply with other requirements as long as the litigant appears to be acting in good faith, making an effort, and giving notice to the other side.
 4. Ensure that court interpreters are available for all court proceedings (including settlement discussions) involving self-represented litigants (and others) who have language barriers.
 5. Give a basic introduction to courtroom protocol, for example, the importance of timeliness, checking in with the clerk (if that is necessary), who sits where, directing arguments to you, not other parties or attorneys, rising when you enter, and other matters you consider important (attire, gum chewing, reading while court is in session, etc.).
 6. Explain the prohibition on ex parte communications (you cannot talk to one side without the other side being present and litigants cannot file any papers with the court that are not served on the other side).
 7. Actively manage and schedule cases involving self-represented litigants.
 8. Insofar as possible, monitor counsel to ensure that a self-represented litigant is not being misled.

A COURTEOUS COURTROOM

9. Start court on time (required in all cases); if delay is unavoidable, apologize and offer a brief explanation.
10. Explain to self-represented litigants that the rude conduct displayed on television shows like *Judge Judy* is not acceptable in a real courtroom, either from them or directed to them.
11. Treat self-represented litigants with patience, dignity, and courtesy (required toward all participants in all court proceedings).
 - Do not make comments or use a tone and manner that are rude, intimidating, harsh, threatening, angry, sarcastic, discouraging, belittling, humiliating, or disdainful.

- Do not interrupt self-represented litigants unless necessary to control proceedings or prevent discourtesy.
 - Do not engage in protracted dialogues or make off-hand, negative comments regarding their pro se status.
 - Address self-represented litigants with titles comparable to those used for counsel.
 - Avoid over-familiar conduct toward attorneys (for example, using first names, sharing in-jokes, referring to other proceedings or bar events, inviting attorneys into chambers, chatting casually before or after court proceedings).
12. Require court staff and attorneys to treat self-represented litigants (and everyone else) with patience, dignity, and courtesy.
 13. Pay attention and act like you are paying attention.
 - If you take notes or refer to books or information on a computer screen during a proceeding, explain what you are doing so the litigants understand that they have your attention.

PLEADINGS

14. Construe pleadings liberally.
 - Look behind the label of a document filed by a self-represented litigant and give effect to the substance, rather than the form or terminology.
 - Do not ignore an obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly refer to that theory.
 - Consider information in other documents filed by a self-represented litigant.
 - Allow amendment freely.
15. Give a self-represented litigant notice of any substantive defect in a pleading and an opportunity to remedy the defect unless it is absolutely clear that no adequate amendment is possible.
16. Read all relevant materials and announce that you have done so before making a ruling.
17. Give the rationale for a decision either in writing or orally on the record.

18. When announcing a decision or entering an order, do not use legal jargon, abbreviations, acronyms, shorthand, or slang.
19. If possible, after each court appearance, provide all litigants with clear written notice of further hearings, referrals, or other obligations.
20. Ensure that all orders (for example, regarding discovery) clearly explain the possible consequences of failure to comply.
21. Follow the principle that cases should be disposed of on the merits, rather than with strict regard to technical rules of procedure.
22. Instruct a self-represented litigant how to accomplish a procedural action he or she is obviously attempting or direct them to resources that will provide such instructions.
 - Do not tell a self-represented litigant what tactic to use, but explain how to accomplish the procedure he or she has chosen.
23. If a motion for summary judgment is filed, advise a self-represented litigant that he or she has the right to file counter-affidavits or other responsive material and that failure to respond might result in the entry of judgment against the litigant.
24. Decide all motions filed by a self-represented litigant without undue delay.

SETTLEMENT

25. At a pre-trial or status conference, bring up the possibility of settling the matter or referring it to mediation.
 - Encourage, but do not try to coerce, settlement or mediation.
26. If the parties present you with an agreed order settling a case, engage in allocution to determine whether the self-represented litigant understands the agreement and entered into it voluntarily.
 - Explain that if an agreement is approved, it becomes an order of the court with which both parties will be required to comply.
 - Determine that any waiver of substantive rights is knowing and voluntary.

PRE-HEARING

27. Explain the process and ground rules (e.g., that you will hear from both sides, who goes first, everything said will be recorded, witnesses will be sworn in, witnesses may be cross examined, how to make an objection).
28. Explain the elements and the burden of proof.
29. Explain the kinds of evidence that can be presented and the kinds of evidence that cannot be considered.
 - Explain that you will make your decision based only on the evidence presented.
 - Encourage the parties to stipulate to uncontested facts and the admission of as much of the documentary evidence as possible.
30. Try to get all parties and counsel to agree to relax technical rules of procedure and evidence so that the hearing can proceed informally with an emphasis on both sides getting a chance to tell their story.

HEARING

31. Ensure that the notice of hearing unambiguously describes in a way a self-represented litigant can understand that a hearing on the merits is being scheduled and the litigant should be prepared with evidence and witnesses to present the case or defense.
32. Allow non-attorneys to sit at counsel table with either party to provide support but do not permit them to argue on behalf of a party or to question witnesses.
33. Before starting, ask both parties whether they understand the process and the procedures.
34. Call breaks where necessary if a litigant is becoming confused or tempers on either side are becoming frayed (or your patience is running low).
35. Question any witness for clarification when the facts are confused, undeveloped, or misleading.
 - Explain at the beginning of a hearing that you will ask questions if necessary to make sure you understand the testimony and have the information you need to make a decision.

- Ask the same type of questions of witnesses called by a represented party if warranted.
 - Take care that your language and tone when asking questions does not indicate your attitude towards the merits or the credibility of the witness.
36. Follow the rules of evidence that go to reliability but use discretion and overrule objections on technical matters such as establishing a foundation for introducing documents and exhibits, qualifying an expert, and the form of questions or testimony.
- If you relax a rule for a self-represented party, relax it for a represented party as well.
 - Require counsel to explain objections in detail.
 - If counsel objects, ask if he or she is arguing that the evidence is unreliable.
 - Explain rulings on evidence.
37. If necessary to prevent obvious injustice, allow a brief recess or adjourn for the day (or longer) to allow a self-represented litigant (or even a represented litigant) to obtain additional evidence or witnesses.
38. Do not allow counsel to bully or confuse self-represented litigants or their witnesses.

THE DECISION

39. Announce and explain your decision immediately from the bench with both parties present if possible unless the volatility of the proceedings suggests that a written decision would be preferable to prevent outbursts and attempts to re-argue the case.
40. If you decide to take a matter under advisement, inform the parties that you wish to consider their evidence and arguments and will issue a decision shortly.
- If possible, announce a date by which a decision will be reached.
41. Reach a decision promptly (required in all cases).
42. Issue an order in plain English explaining the decision, addressing all material issues raised, resolving contested issues of fact, and announcing conclusions of law.

43. If asked about reconsideration or appeal, refer the litigant to resources for self-represented litigants on this topic.
44. If asked about enforcement of an order or collection of a judgment, refer the litigant to any resources for self-represented litigants on this topic.

Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants

Discussion Guide

INTRODUCTION

This discussion guide provides materials that can be used to plan and present a session on judicial ethics and self-represented litigants. The materials describe a variety of different education techniques and give a planner flexibility to design a session that reflects the interests, needs, size, and composition of the specific audience and the time limits for the presentation. Different parts of the discussion guide can be used different years to present completely different programs.

The discussion guide includes suggestions for a self-test, small group exercises, hypotheticals, a panel discussion, a debate, best practices, role plays, and a talk. Substantive background for the curriculum is provided in the accompanying paper, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*.

THE SELF-TEST

The purpose of the self-test is to get participants to start thinking about their attitudes about the role of a judge in general and in cases involving self-represented litigants in particular and to set the stage for the rest of the discussion. For example, if a participant answers (as most presumably would) that a judge is more than a mere arbitrator, referee, or moderator, the groundwork would be laid for arguments that in cases involving self-represented litigants, a judge may clarify procedures, ask questions, and take similar initiatives.

The self-test may be sent to individuals as they register for a program before the date or when they check in at the program. If resources and time are available, it might be an interesting exercise to collect the self-tests, compile the answers, and report the results back to the group in the middle or at the end of the program. Also, a responder system could be used if available to poll the participants on the issues raised in the self-test with the benefit of anonymity.

SELF-TEST

Please indicate the extent of your agreement with these statements:

1. A litigant who chooses to represent himself or herself must be held to the same standards and comply with the same rules as attorneys without exceptions.

Strongly agree Agree Disagree Strongly disagree

2. Few litigants would choose to proceed without representation if they could afford to hire a lawyer.

Strongly agree Agree Disagree Strongly disagree

3. A judge is more than a mere arbitrator, referee, or moderator.

Strongly agree Agree Disagree Strongly disagree

4. A judge cannot explain the basis for a ruling if the explanation would indirectly assist a self-represented litigant.

Strongly agree Agree Disagree Strongly disagree

5. A judge should inform a self-represented litigant of specific defects in pleadings.

Strongly agree Agree Disagree Strongly disagree

6. When a self-represented litigant is involved in a case, a judge should take special care to make verbal and written orders clear and free of legal jargon.

Strongly agree Agree Disagree Strongly disagree

7. Many judges ignore the rule that self-represented litigants are held to the same standards as attorneys to prevent cases from grinding to a halt.

Strongly agree Agree Disagree Strongly disagree

8. Court programs that assist self-represented litigants are necessary to provide meaningful access to and ensure public confidence in the justice system.

Strongly agree Agree Disagree Strongly disagree

9. Informing a self-represented litigant of the proper procedures for the action he or she is attempting turns a judge into an advocate.

Strongly agree Agree Disagree Strongly disagree

10. Questioning a witness to clarify testimony is consistent with the judge's role.

Strongly agree Agree Disagree Strongly disagree

11. The principle that the rules of procedure should work to do substantial justice. requires a judge to try to ensure that a self-represented litigant's cause or defense is not defeated solely by strict application of technical rules or by inadvertent mistake.

Strongly agree Agree Disagree Strongly disagree

12. Court programs that assist self-represented litigants encourage litigants to try cases without an attorney.

Strongly agree Agree Disagree Strongly disagree

13. The hallmarks of an honorable judicial system include fairness, courtesy, and efficiency, as well as impartiality.

Strongly agree Agree Disagree Strongly disagree

14. Liberally construing pleadings filed by a self-represented litigant compromises a judge's impartiality.

Strongly agree Agree Disagree Strongly disagree

15. Making reasonable accommodations for self-represented litigants invites an undesirable, open-ended participation by the judge in the process.

Strongly agree Agree Disagree Strongly disagree

16. Informing a self-represented litigant how to respond to a motion for summary judgment turns a judge into an advocate.

Strongly agree Agree Disagree Strongly disagree

17. Court programs that assist self-represented litigants help prevent pro se litigation from bogging down the court system.

Strongly agree

Agree

Disagree

Strongly disagree

SMALL GROUPS

Small group discussions will give all participants an opportunity to talk about ethical issues raised by self-represented litigants and share their solutions. In addition, small groups allow for positive “peer pressure,” in other words, not just an expert saying this is how to do it, but other judges explaining to other judges how they solved a problem or would approach an issue.

To expedite formation of the small groups, the room should be set up so that the participants are sitting at round tables of 8 to 10, with those at each table comprising a group. If participants come from different types of courts, attendees may be divided into smaller groups based on the court they are from (in other words, all judges from housing court would be assigned to one or more groups, all judges from family court assigned to other groups, etc.). Alternatively, depending on the exercise, it might be helpful to have judges from different courts in the same group to share tips and experiences across disciplines.

The small group discussions may be led by facilitators chosen ahead of time and trained to facilitate the discussion. Or the groups can designate a reporter at the beginning of the small group session (the choice can be completely arbitrary based on whose birthday is closest, who has the most pets, who lives the closest to the meeting place, who has the brightest tie or other clothing, or a similar factor).

After the time allotted for discussion, the small groups should reconvene as one large group, and the leader should moderate the reports from each group about its answers to the questions. Follow-up questions about the rationale for answers and exceptions to the rules should also be asked. The leader may wish to take notes on a flip chart or overhead projector sheet during the reporting back to keep track of the responses.

Following are exercises suitable for small groups. One or more may be chosen for the small group discussion portion of the session.

SMALL GROUP EXERCISES

1. Discuss the hypotheticals (see pages 68–80) (at least one hour is needed for this).
2. Discuss the proposed best practices (see pages 51–57), identifying items with which group members agree unreservedly, any about which they have reservations, any with which they strongly disagree, and anything they think is missing. Discuss whether the jurisdiction should adopt the best practices or at least some best practices for cases involving pro se litigants.

3. Have members of the group volunteer an anecdote to finish the sentence: “I realized that holding self-represented litigants to the same standard as attorneys was not justifiable when” or “I realized I had to do more than just call balls and strikes in cases with self-represented litigants when”
4. Ask each member of the group to describe the evolution of his or her attitude on the issue of accommodating self-represented litigants in the courts.
5. Have members of the group describe a situation in which they were the layperson (dealing with doctors, school system, computer experts, for example) and felt frustrated by their treatment. Discuss whether this experience gave them more empathy for pro se litigants.
6. Have members share the best advice another judge gave them about handling cases involving self-represented litigants.
7. List tips on handling cases involving self-represented litigants.
8. List tips on handling cases involving a difficult self-represented litigant or counsel who is being obstructive with respect to the self-represented litigant.
9. Have group member share the colloquies they use the first time an unrepresented litigant appears in their court.
10. Have group members share the colloquies they use when presented with a settlement in a case involving a self-represented litigant.
11. Discuss whether court rules should be changed to eliminate evidence admissibility rules in all civil bench trials with self-represented litigants.
12. Discuss whether the court should adopt simplified procedural rules for cases involving self-represented litigants or for types of cases frequently involving self-represented litigants (such as housing court cases, small claims, and family court cases).
13. Discuss when a decision should be announced immediately from the bench at the close of a hearing and when it is better to wait and take the case under advisement.
14. Identify legal jargon, abbreviations, acronyms, shorthand, and slang commonly used in the group members’ courts and suggest ways of changing those into plain English.

15. What has been the jurisdiction's most helpful innovation in response to self-representation?
16. Identify what should be the priority for the court's next steps in meeting the challenge of self-represented litigation.
17. Should the code of judicial conduct be amended to explicitly recognize judges' ability to treat self-represented litigants differently? If so, what should that provision say?

PANEL DISCUSSION

A panel discussion may be used to briefly introduce the issue of judicial ethics and self-represented litigants but is not as effective as small group discussions for completely covering the topic. A panel discussion is a good way of up-dating judges on new or planned programs to assist self-represented litigants in the jurisdiction and on efforts to increase the availability of pro bono representation or unbundled legal services. Panelists may also undertake any of the exercises listed for small groups.

Although hard to arrange, a panel comprised of litigants who have represented themselves would provide an important perspective that could inspire the judges in a way that sets the groundwork for changed conduct. Judges, court staff, or legal aid offices may be able to suggest suitable pro se litigants to serve as panelists. The panelists could share:

- How they felt while in the courthouse and courtroom
- The court programs or actions by court staff or judges that helped them
- What additional information or programs they wanted from the courts
- Any judicial conduct or comments that made them feel that the judge was hostile to them as pro se litigants or biased in favor of attorneys or the represented party

HYPOTHETICALS

Following are three hypotheticals, one set in a housing court, one in a family court, and one in a small claims or general civil jurisdiction court. Each jurisdiction should revise the hypotheticals to reflect specific features of the jurisdiction such as the names of the specific court, procedures, and usual names for pleadings, which vary from state to state. The hypotheticals have brackets around language that is likely to require editing to reflect a specific jurisdiction. (A copy of the hypotheticals in a word-processing format may be obtained from the Center for Judicial Ethics.)

The hypotheticals may be discussed in small groups (at least an hour is needed for the discussion). It is helpful after discussion of the hypotheticals for each group to report back in a plenary session so the groups can learn from each other's discussion. Depending on the time available, in the plenary session, the reporter for each small group can be asked for the group's consensus on each question (and whether there were any dissents) or to identify which questions were the "easiest" for the group and which produced the most discussion.

The hypotheticals may also be discussed by a group of panelists or through use of a responder system.

HYPOTHETICALS

- *Feel free to choose more than one option*
- *Feel free to come up with your own alternatives*
- *Consider what additional information might influence how you would proceed*

THE SELF-REPRESENTED LITIGANT IN [FAMILY COURT]¹

After a contentious 10-year marriage, Peggy and Mark Tyler divorce. Mark went through three or four attorneys during the divorce proceedings, eventually ending up unrepresented at the time a final judgment is agreed to and entered. Peggy is given custody of their two minor children, and Mark is required to pay \$2,000 a month for each child in child support. During their marriage, Peggy worked at home to take care of the children. Mark owns a car dealership, selling Hummers.

1. Over a year after the final judgment was entered, without representation by counsel, Mark files in the [family court] a document called “appeal from custody decision based on new evidence” and asks for an ex parte hearing. He alleges an emergency requiring a change in custody in conclusory terms and does not cite the rule that allows for ex parte emergencies custody changes or allege that he tried and failed to give the appropriate notice as required by the rule. Do you:
 - a. Deny the “appeal” without explanation
 - b. Deny the “appeal” and explain why
 - c. Deny the “appeal” and explain what he has to do to get his pleadings considered
 - d. Liberally construe the pleading and grant the change in custody
 - e. Liberally construe the pleading as an [emergency complaint for modification and motion for emergency custody] and consider it on the merits
- **[Would you send the parties to ADR? If not, why not? If so, why and how would you explain ADR to Mark?]**
2. Miraculously, the parties reach an agreement as to custody, but now there is a dispute about child support. Mark files a [complaint for modification]

1. The bracketed language in the hypotheticals indicates language that may have to be changed to reflect the specifics in the jurisdiction, for example, to use the specific names of the courts or procedures.

asking for a reduction in child support due to changed circumstances, namely a reduction in his income due to the distraction from business caused by the divorce and custody disputes. Peggy, who is represented by counsel, files an answer and counter-claim arguing that Mark's obligations should be increased because the original amount was based on tax returns that grossly (and probably illegally) understated Mark's income. At the first hearing, Mark appears without counsel. Do you:

- a. Say nothing
 - b. Tell him the old saying about a person representing himself having a fool for a client and warn him that he cannot look to you for assistance
 - c. Explain to him the disadvantages of not having an attorney, describe the possibilities for obtaining representation, and offer to give him an extension of time to procure an attorney
3. Assume Mark insists on proceeding on his own, saying he does not need an attorney to tell the truth. Do you:
- a. Shrug your shoulders and continue as usual
 - b. Tell him it is his responsibility to familiarize himself with the applicable rules, including the rules of evidence
 - c. Refer him to the court's self-help resources
 - If so, what resources are available to him?
 - d. Explain the process and ground rules
 - If so, what would you explain?
5. Mark files a motion to suppress evidence supporting Peggy's claim that the tax returns were incorrect, citing his 5th Amendment right not to incriminate himself. Do you:
- a. Deny the motion without explanation
 - b. Deny the motion and explain that it is not based on the correct theory
 - c. Liberally construe the motion as a motion in limine and consider it on the merits
6. You receive a letter from Mark's mother who tells you what hard times her son has experienced recently, how the tax scam was Peggy's idea, and what a slut her former daughter-in-law is. Do you:
- a. Do nothing
 - b. Disqualify yourself because you have received extra-judicial information
 - c. Disclose the letter, place a copy in the court file, state you are not considering the information it contains, and instruct Mark to tell his family to stop communicating ex parte with you

- d. Refuse to open the letter. Ask your secretary to send it back to Mark's mother with a form letter instructing her not to communicate with the judge
7. Peggy's attorney notices Mark for a deposition, but he does not show up nor does he show up when the deposition is rescheduled. Peggy's attorney asks for sanctions, including dismissal of Mark's petition. Do you:
- a. Grant the motion
 - b. Impose sanctions short of dismissal
 - c. Give Mark one more chance
 - d. Give Mark one more chance, explaining clearly and in non-legalese the consequence of his failure to show up for the next scheduled deposition
8. Mark files a complaint against you with the [judicial conduct commission] claiming you are biased against him specifically, pro se litigants in general, and pro se fathers most of all and then files a motion to disqualify you based on the complaint. Do you:
- a. Disqualify yourself with a sigh of relief
 - b. Assure yourself that you feel no subjective partiality and deny the motion to disqualify
10. When the hearing finally proceeds, the animosity between the ex-spouses is palpable. Mark talks directly to Peggy and mutters under his breath a lot. During his examination of his ex-wife, Mark continually asks Peggy about her spending habits, use of alcohol, and friends. Peggy's attorney continually objects on the grounds those matters are irrelevant to the child support dispute, and you continually sustain the objections. Do you:
- a. Do nothing other than respond to objections
 - b. Remind Mark of the rules of courtesy that apply in your court and to address you, not Peggy or her counsel
 - c. Threaten to cut off Mark's cross-examination
 - d. Impose a time limit on Mark's cross-examination
 - e. Cut off Mark's cross-examination
 - f. Call a break
11. When it is his turn, Mark testifies about Peggy's spending habits when they were married, her use of alcohol, and her disreputable friends. After delivering what he clearly thinks is damaging evidence, he says he is done, although he has not given any testimony about the alleged changed circumstances that would justify his request for a decreased child support obligation. Do you:

- a. Do nothing
 - b. Ask Mark if he wants to present any evidence on the issue of changed circumstances
 - c. Ask Mark questions that would indicate whether there have been changed circumstances
 - d. Ask Peggy's attorney if she would like to file a [motion for summary judgment]
 12. You have heard all the evidence and know how you are going to rule. Do you:
 - a. Issue an immediate decision at the close of the hearing while both parties are present
 - b. Announce you are ruling in Peggy's favor and ask her attorney to file proposed findings of fact and conclusions of law and serve them on Mark
 - c. Inform the parties that you will take the matter under advisement and mail a written decision within 30 days
 - d. Inform the parties that you will take the matter under advisement and ask that Peggy's attorney and Mark send you proposed findings of fact and conclusions of law within 10 days
- **Would any of your answers have been different if both litigants were self-represented?**
 - **Could anything have been done by the court system or by an individual judge in managing the case that would have avoided most if not all of the problems that arose?**

HYPOTHETICAL

- *Feel free to choose more than one option*
- *Feel free to come up with your own alternatives*
- *Consider what additional information might influence how you would proceed*

THE SELF-REPRESENTED LITIGANT IN HOUSING COURT

Li Wen, a Chinese immigrant, owns an apartment building at 626 W. Terrace. One of the units is rented under a lease to Shu Chan, also a Chinese immigrant.

1. Without the services of an attorney, Wen files a [notice to quit and summary process summons and complaint] to evict Chan for non-payment of rent. Both Wen and Chan appear without counsel. Wen speaks pretty good English, but it is difficult to understand Chan. You believe she is claiming that she has paid all her rent and that Wen has not made necessary repairs since the unit suffered water and smoke damage from a wild party held by another tenant. Reviewing the file, you notice that the [summary process summons and complaint were not properly served] — Wen filed the [summons and complaint] without first serving Chan. Chan, however, does not argue that she was not properly served. Do you:
 - a. Do nothing
 - b. Continue the proceeding until the court can arrange for an interpreter for Chan
 - c. Dismiss the case without explanation
 - d. Dismiss the case and tell Wen that he should re-file and get the papers properly served
 - e. Dismiss the case while explaining to Wen that the papers were not properly served
 - f. Suggest to Chan that she make a motion to dismiss for failure of personal jurisdiction
 - g. Say nothing about the parties not being represented
 - h. Tell them the old saying about a person who represents himself or herself having a fool for a client and warn them that they cannot look to you for assistance
 - i. Explain to them the disadvantages of not having an attorney, describe the possibilities for obtaining representation, and offer to give them an extension of time to procure attorneys

2. Several days later, your secretary comes into your office and says Chan is there asking whether she has to pay rent despite the defects in the apartment, if she pays can she stay, and how can she force the landlord to fix the apartment. Your secretary asks what to do. Do you:
 - a. Tell your secretary to just get Chan out of the office without being rude
 - b. Tell your secretary to refer Chan to the court's self-help resources
 - c. Tell your secretary to tell Chan that there is a law that allows a tenant to withhold rent for really bad defects
 - d. Go talk to Chan yourself and tell her what you would do if you were having trouble with your landlord
3. At the next hearing, Wen is now represented by an attorney although given his inexperience in housing court, under-represented by an attorney may be more accurate. At least, the [summons and complaint] have been correctly served this time. There is no one with Chan other than the court interpreter. Do you:
 - a. Shrug your shoulders and continue as usual
 - b. Verify that Chan intends to continue without representation
 - c. Refer her to the court's self-help resources
 - If so, what resources are available to her?
 - d. Explain the process and ground rules
 - If so, what would you explain?
- **[Would you send the parties to ADR? If not, why not? If so, why and how would you explain ADR to the parties?]**
4. After Chan discusses the case with the landlord's attorney, she signs an [agreement for judgment] that provides for judgment for Wen for possession and for all of the outstanding rent, plus late fees and attorneys fees. The stipulation does not mention Chan's withholding defense, does not give Chan any credit for her last month's rent, which she paid on taking the apartment, or interest on the security deposit, and provides that the security deposit is forfeited due to damage to the apartment. Do you:
 - a. Sign the judgment and thank the parties for reaching an amiable resolution
 - b. Engage in a colloquy with Chan to ensure she understands the terms of the judgment and what she is giving up
 - c. Suggest to Chan that she talk with an attorney
5. The settlement falls through, and the case proceeds. The landlord files requests for admission, and when Chan does not answer within the time

- limit, argues that the facts inquired about should be deemed admitted. Chan does not file a motion asking that her “admissions” be withdrawn but contests the facts admitted and offers to respond to the request for admissions, stating she thought her answer, which denied the allegations of the complaint, was sufficient. Do you:
- a. Deem the facts admitted because Chan did not respond
 - b. Deem the facts admitted because Chan has not shown good cause to withdraw the admissions
 - c. Tell Chan she should file a motion to withdraw
 - d. Tell Chan if she wants to withdraw the admissions, she has to file a motion
 - e. Construe Chan’s argument as an oral motion to withdraw, allow the landlord to respond, and then decide whether to allow Chan to withdraw the admissions on the merits
6. You receive an e-mail from Chan with an attachment containing digital photos of the damage done to her apartment; the e-mail does not indicate that it was also sent to the landlord or the landlord’s attorney. Do you:
- a. Delete the e-mail
 - b. Disqualify yourself from the case based on extra-judicial information
 - c. Disclose the e-mail to the landlord and give him a copy, put a copy in the court file, state you are not considering the information it contains, and explain to Chan why the attempt to communicate ex parte was inappropriate and should not be repeated
7. At the next hearing, Chan’s nephew accompanies her. He is not an attorney but speaks English and Mandarin, and asks to speak for Chan during the hearing. Do you:
- a. Allow him to do so
 - b. Prohibit him from questioning witnesses, making arguments, or presenting evidence but allow him to sit with Chan at the counsel table
 - c. Prohibit him from sitting at counsel table.
8. During her testimony, Chan tries to testify about what the housing inspector told her. Wen’s attorney objects. Do you:
- a. Sustain the objection without explanation
 - b. Ask the attorney to explain the basis for the objection
 - c. Sustain the objection and explain why
 - d. Overrule the objection
 - e. Offer to allow Chan an opportunity to procure the presence of the inspector

9. Chan asks how she can procure the presence of the inspector. Do you:
 - a. Tell her
 - b. Ask Wen's attorney if he would mind if you explained subpoena procedures to Chan
 - c. Refer her to the appropriate rule
 - d. Refer her to self-help resources
 - e. Subpoena the inspector as the court's witness
 10. The landlord's counsel calls the landlord as a witness and begins to ask questions about damage to the property purportedly caused by Chan. Chan does not object even though that was not a grounds given for the eviction and a landlord cannot recover for property damage in an eviction proceeding. Do you:
 - a. Do nothing
 - b. Instruct the attorney to limit his questions to the issues in the case
 - c. Suggest to Chan that she make objections
 11. You have heard all the evidence. Do you:
 - a. Issue an immediate decision at the close of the hearing while both parties are present
 - b. Inform the parties that you will take the matter under advisement and mail a written decision within 30 days
 - c. Ask the parties to file proposed findings of fact and conclusions of law
 - d. Announce you are ruling in the landlord's favor and ask his attorney to file proposed findings of fact and conclusions of law and serve them on Chan
 12. You enter a judgment of possession and rent to the landlord. Chan asks you if she has to leave immediately and how to appeal. The landlord's attorney asks you how to enforce the judgment. Do you:
 - a. Say you cannot answer those questions
 - b. Tell Chan she has [10 days] to appeal but if she does not appeal she must be out on the [11th] day
 - c. Explain how an appeal is taken
 - d. Tell the landlord to talk to the sheriff
 - e. Refer Chan to the self-help resources
 - f. Refer the landlord's attorney to the self-help resources
- **Would any of your answers be different if both litigants were self-represented?**
 - **Could anything have been done by the court system or by an individual judge in managing the case that would have avoided most if not all of the problems that arose?**

HYPOTHETICALS

- *Feel free to choose more than one option*
- *Feel free to come up with your own alternatives*
- *Consider what additional information might influence how you would proceed*

THE SELF-REPRESENTED LITIGANT IN [SMALL CLAIMS]¹ COURT

After a six-month engagement, Jean Rowe and Edmund Baldwin announce on New Year's Eve that their wedding will take place on April 25. Jean orders a wedding dress from the most reputable bridal salon in the county, Eva's House of Brides. For \$1,150, Jean chooses a modern, pure-white, floor-length gown with a matching \$100 veil. Her six bridesmaids pick out floor-length gowns in teal blue that cost \$700 each; six pairs of shoes dyed-to-match are also ordered at \$40 a pair. Eva's House of Brides requires a 50% deposit upon placing an order. Jean pays the deposit by check on January 17 and is told that the dresses will be ready for a final fitting by April 13.

April 13 comes and goes, and Jean calls Eva every day to inquire about the dresses. Eva reassures her that they will arrive in plenty of time for the wedding. Finally, the dresses arrive on April 24, the day before the wedding. Jean and her bridesmaids hurry to the store only to find that the wedding gown is cream-colored rather than white and much too tight. The bridesmaids' dresses are street-length and a shade of blue that clashes with the shoes. Jean races to the pricey local department store and chooses off-the-rack dresses from a meager selection. The substitute bridal dress costs \$1,500; the substitute bridesmaids' dresses cost \$800 each plus shoes that cost \$50 a pair.

After a wedding, beautiful despite the apparel calamity, and a relaxing honeymoon, Rowe sues for the return of her deposit and for the difference in cost between the dresses and shoes she ordered from Eva's House of Brides and what she was forced to buy. Her request for damages is \$6,000.² Eva disputes that the dresses were unusable and blames the poor fit on weight gain by Rowe.

1. Rowe files her suit in [superior] court, and Eva's House of Brides files a motion to dismiss, citing the rule setting jurisdictional limits for the court. Do you:

1. The bracketed language in the hypotheticals indicates language that may have to be changed to reflect the specifics in the jurisdiction, for example, to use the specific names of the courts or the procedures.

2. The price of the items in the hypothetical or number of items can be adjusted either to keep the amount sued for within the amount for small claims court in your jurisdiction or to take it out of small claims court if you would like a hypothetical for a general jurisdiction court.

- a. Grant the motion without explanation
 - b. Grant the motion but tell Rowe she should re-file in [district] court
 - c. Grant the motion, explaining that the [superior] court hears cases involving over \$25,000 while the [district] court hears cases involving under \$25,000
2. Rowe re-files in [district] court. She appears in court for a scheduled hearing without an attorney. The defendant's attorney, grumbling about the "help" Rowe received from the [superior] court judge, is also there. You ignore the attorney's grumbling. Do you:
 - a. Say nothing about Rowe not being represented
 - b. Tell her the old saying about a person representing herself having a fool for a client and warn her that you cannot give her any help if she persists
 - c. Explain to her the disadvantages of not having an attorney, describe the possibilities for obtaining representation, and offer to give her an extension of time to procure an attorney
3. Assume she insists on proceeding on her own. Do you:
 - a. Shrug your shoulders and continue as usual
 - b. Inform her of the court's self-help resources
 - If so, what resources are available to her?
 - c. Explain the process and ground rules
 - If so, what would you explain?
 - d. Schedule a status or pretrial conference as soon as possible
- **[Would you send the parties to ADR? If not, why not? If so, why and how would you explain ADR to Rowe?]**
4. At the status conference, do you:
 - a. Do nothing different than you would if both parties were represented
 - b. Encourage settlement
 - c. Reiterate your statement to Rowe about the advisability of getting an attorney
 - d. Explain how the case will proceed, the elements of the case, what type of evidence will be acceptable during the trial, and similar matters
 - e. Try to get the parties to stipulate to as much as possible
5. At the status conference, Eva's attorney files a motion for summary judgment. Do you:
 - a. Do nothing different than if both sides were represented

- b. Inform Rowe of the necessity of opposing a summary judgment motion
 - c. Inform Rowe of the necessity of opposing a summary judgment motion with affidavits or by amending the complaint
- 6. Assume you do nothing, a month or so later, the motion for summary judgment comes up in your tickler system, and there is no reply in the file from Rowe. Do you:
 - a. Do nothing
 - b. Grant the motion
 - c. Deny the motion because in this type of case there is almost certainly a question of fact
 - d. Set the case for hearing and at the hearing explain to Rowe what she needs to do to avoid judgment being entered against her
- 7. Rowe manages to submit affidavits that establish an issue of fact, and you deny the defendant's motion for summary judgment. Settlement negotiations fail, and the case proceeds to trial. When she is testifying, Rowe continually refers to "she," "he," "it," "them," "there," and "then," and you find yourself losing track. Do you:
 - a. Do nothing
 - b. Ask her to be more specific
 - c. Ask her clarifying questions
 - d. Call a break
- 8. During her testimony, as evidence of her payment of the deposit, Rowe introduces a bank statement that includes a copy of the check. The defendant's counsel objects. Do you:
 - a. Kick yourself for not taking care of it pre-trial and sustain the objection
 - b. Sustain the objection and remind Rowe you told her she should get an attorney
 - c. Sustain the objection and explain to Rowe she needs to have the actual cancelled check
 - d. Overrule the objection
 - e. Ask defendant's counsel, "do you dispute that the deposit was paid? If not, would you do me a favor and stipulate to that fact in order to move the case along?"
- 9. During his examination of Rowe, the defendant's attorney calls her "Jeannie" or "Jeannette," asks her multi-part questions, frequently interrupts her, and snickers when her confusion becomes apparent. Do you:

- a. Do nothing
 - b. Instruct counsel that in your court parties are called by their titles and last names and he should refer to the plaintiff as “Ms. Rowe”
 - c. Tell counsel to stop being a jerk and ask simple questions
 - d. Instruct Rowe not to answer a question she does not understand
 - e. Say to defense counsel, “I am sorry I did not understand that question, could you re-phrase it?”
 - f. Call a break
 10. You have heard all the evidence. Do you:
 - a. Issue an immediate decision at the close of the hearing while both parties are present
 - b. Inform the parties that you will take the matter under advisement and mail a written decision within 30 days
 - c. Ask the parties to file proposed findings of fact and conclusions of law
 - d. Announce you are ruling in the Rowe’s favor and ask her to file proposed findings of fact and conclusions of law and serve them on Eva’s House of Brides
 11. You rule in favor of Rowe in open court. A couple months later, she shows up outside your courtroom and asks how to get the money from Eva’s Bridal Shop, which has not paid. Do you:
 - a. Say you cannot help her
 - b. Refer her to the court’s self-help resources
 - c. Give her detailed instructions on how to proceed
- **Would any of your answers have been different if both litigants were self-represented?**
 - **Could anything have been done by the court system or by an individual judge in managing the case that would have avoided most if not all of the problems that arose?**

BEST PRACTICES

The materials contain Proposed Best Practices for cases involving self-represented litigants (pages 51–57). The best practices may be covered by a panel or in small groups. The discussion should:

- Consider whether best practices should be adopted in the jurisdiction and if so by whom
- Identify
 - ◆ The Proposed Best Practices with which they agree unreservedly
 - ◆ The Proposed Best Practices about which they have reservations
 - ◆ The Proposed Best Practices with which they strongly disagree
 - ◆ Additional best practices that should be added
- Edit the Proposed Best Practices to make it particularly relevant to the specific type of court and jurisdiction
- Edit the language for clarity

ROLE PLAYS

Some judges may enjoy role-playing as part of a presentation. These actors can be recruited several weeks before the presentation and given the situations they will perform. To make the activity more spontaneous and realistic, the exchanges are not scripted. After each scenario, the leader can ask for suggestions and comments about the situation.

The following situations may make good role plays. The actors may also have good ideas for situations to present.

1. One actor plays a judge but in a situation in which the judge is the layperson, and a second actor plays an expert or customer service representative. The judge tries to get information out of the second person, who uses jargon, keeps referring the judge to someone else, and similar behavior. In the situation, for example, the judge could be trying to solve a problem for the judge's child dealing with school system bureaucracy or to solve a problem for the judge's parent dealing with health system bureaucracy, the judge could be calling a help-line for a computer service, the judge could be trying to undo an identity theft, or the judge could be waiting at an airport when weather has cancelled or delayed many flights.
2. One actor plays a judge, the other plays a clueless, sympathetic self-represented litigant. They role play:
 - a. The first appearance at which the judge wants to verify that the litigant is unrepresented and explain the dangers of self-representation, how to get an attorney, etc.
 - b. Subsequent proceedings when the self-represented litigant has questions
 - c. Just before the case is going to go to a hearing
3. The above scenario but the actor playing the self-represented litigant is verbose and confident of his or her ability to prove the case if the judge will only be fair.
4. The above scenario but the actor playing the self-represented litigant is belligerent following other encounters with the justice system (perhaps in earlier proceedings in the same family law case), angry with the other party and the other party's attorney, and convinced the judge is biased against self-represented litigants.
5. The above scenario but add a third actor playing another self-represented litigant.

6. The above scenario but add a third actor playing an attorney who is an uncooperative bully.

DEBATE

Divide the participants into two groups in separate rooms or separate portions of the room. This can be done arbitrarily or people can be divided into two groups depending on whether they identify themselves as sympathetic but skeptical that judges should apply different standards to self-represented litigants (Group A) or as willing to accommodate self-represented litigants but not sure how far to go (Group B).

In break-out sessions, ask Group A to list on a flip chart all the reasons they can think of for prohibiting judges from extending any leniency to self-represented litigants, and ask Group B to list on a flip chart all the reasons they can think of for allowing judges to make accommodation for self-represented litigants. Then have the groups exchange flip-charts to review each other's arguments.

During a break, one or more discussion leaders should review both flip charts. In a plenary session after the break, the discussion leader or leaders should review all the points made on each flip chart, matching arguments and counter-arguments where possible. Then they should ask if anyone from Group A would move themselves to Group B following the discussion and vice versa. Ask members of Group A if there is anything that would move them into Group B. Ask Group B if they have always had an accommodating attitude toward self-represented litigants and if not why they changed.

Alternatively, a traditional debate could be held between two judges with the topic: "Resolved — Meaningful access to the courts requires some degree of extra care and effort on the part of trial judges to ensure that no person's cause or defense is defeated solely by reason of their lack of representation and unfamiliarity with procedural or evidentiary rules."

TALK

Using his or her own experience and the background in *Reaching Out or Overreaching*, a judge could present a talk on judicial ethics and pro se litigants. The goal of such a talk should be an interactive discussion, not just a lecture. Depending on how many questions are asked, the presentation would probably last an hour and a half. Appropriate handouts for the presentation are the executive summary of *Reaching Out or Overreaching* and the Proposed Best Practices for Cases Involving Self-Represented Litigants.

The presenter should study *Reaching Out or Overreaching* carefully, focusing on cited cases from his or her own jurisdiction, and should research authority in his or her own state (in general, not just in cases involving self-represented litigants) on issues such as interpreting the rules of procedure to promote fundamental justice, deciding cases on the merits, the role of a judge, liberal construction of complaints, instructing a litigant about responding to a motion for summary judgment, and asking questions for clarification.

To encourage participation, it may be helpful to begin a presentation by asking the audience to indicate with a show of hands:

- How many of you have never presided over a case in which at least one side represented himself or herself?
- How many of you have never presided over a case in which both sides represented themselves?
- How many of you have presided over a civil jury trial in which at least one side represented himself or herself?
- How many of you would agree that the number of cases involving at least one self-represented litigant has increased since you became a judge? Increased substantially?
- How many of you would agree that few litigants would choose to represent themselves if they could afford to hire a lawyer?
- How many of you would agree that self-represented litigants have an unrealistic idea of what is going to happen in court and how much assistance the judge will give them?
- How many of you would agree that when both parties represent themselves, the presiding judge's problems are doubled?
- How many of you would agree that when both parties represent themselves, the presiding judge's job is easier?

The self-test (pages 61–63) may also be used to begin the presentation.

The presenter should share personal experiences such as anecdotes that describe the evolution of his or her attitude about accommodating self-represented litigants in the courts or a situation in which the presenter was the layperson

(dealing with doctors, a school system, computer experts, for example) and the frustration he or she felt that produced empathy for pro se litigants. Other topics the presenter may cover include the best advice another judge gave the presenter about handling cases involving self-represented litigants and tips on handling cases involving self-represented litigants.

The presenter can also review the Proposed Best Practices (see pages 51–57) and lead a discussion of whether the jurisdiction should adopt the Best Practices or at least some best practices for cases involving pro se litigants.

Following are slides from a sample Powerpoint presentation that may assist a presenter. (An electronic version of the Powerpoint presentation may be obtained from the Center for Judicial Ethics.)

Reaching Out or Overreaching

Judicial Ethics and the Self-Represented Litigant

Thesis

Without raising reasonable questions about impartiality, judges may exercise discretion

- To make equitable, procedural accommodations
- To provide self-represented litigants reasonable opportunity to have cases fully heard

Premises

- Judge is more than mere arbitrator, referee, or moderator
- Judge can control orderly presentation of evidence
- Cases should be decided on merits
- Rules of procedure should work to do substantial justice

Diligent Litigant

- Attempts to
 - Acquire familiarity with rules
 - Comply with procedures, orders
 - Request assistance
 - File pleading
 - Offer support for argument

Non-Diligent Litigant

- Abuses dignity of courtroom
- Is grossly negligent or lacks good faith
- Engages in pattern of delay
- Deliberately fails to comply with clear, specific order
- Fails to file even defective pleading

Accommodations

- Direct litigant to resources
- Allow reasonable continuances to hire lawyer, prepare case
- Give basic introduction to courtroom protocol

Accommodations

- Liberally construe pleadings
 - Overlook failure to cite correct legal theory
 - Look behind label of document
 - Overlook poor syntax and sentence construction
 - Consider other submissions

Accommodations

- Inform of defects in pleading
- Use plain English
- Explain basis for rulings
- Freely allow amendment
- Do not dismiss based on technical rules

Accommodations

- Instruct pro se litigant on how to achieve action litigant is obviously attempting
- Before approving settlement, determine that waiver of substantive rights is knowing and voluntary

Accommodations

- Explain process, elements, burden of proof, evidence
- Ask questions for clarification
- Call attention to omissions in evidence
- Relax rules of evidence

Unreasonable accommodations

- Create claims, defenses
- Amend or redraft pleadings
- Infer facts
- Disregard substantive law, requirements of jurisdiction
- Prejudice other party

Demeanor

- Do not use disdainful comments, tone, or manner
- Do not make negative comments about self-representation.
- Use titles for pro se litigants comparable to those for counsel
- No over-familiar conduct toward attorneys

Arguments Against

- Litigant who chooses to represent self must be held to same standards
- Judge should not become advocate for one side

Arguments Against

- Invites undesirable, open-ended participation by judge
- Favors unrepresented litigants
 - Over badly represented ones
 - Over represented parties

Conclusion

Without raising reasonable questions about impartiality, judges may exercise discretion

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